159 U.S. 100

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 863.

JOHN BROWN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED DECEMBER 11, 1894.

(15747.)

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a In the circuit court of the United States for the western district of Arkansas.

Pleas and proceedings before the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court, in the case of—

UNITED STATES
vs.
JOHN BROWN. } Indicted for murder.

1 *Indictment.*

United States of America, western district of Arkansas, in the circuit court, February term, A. D. 1892.

UNITED STATES
vs.
JOHN BROWN. } Murder.

The grand jurors of the United States of America duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That John Brown, a white man and not an Indian, on the 8th day of December, A. D. 1891, at the Cherokee Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms in and upon the body of one Josiah Poorboy, then and there being feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said John Brown, with a certain gun then and there charged with gunpowder and one leaden bullet, which said gun he, the said John Brown, in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off, to, against, and upon the said Josiah Poorboy, and that the said John Brown, with the leaden bullet aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said John Brown discharged and shot off, as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him, the said Josiah Poorboy, in and upon the right side of the breast of him, the said Josiah Poorboy, giving to him, the said Josiah Poorboy, then
2 and there with the leaden bullet aforesaid, so, as aforesaid, discharged and shot out of the gun aforesaid, by the said John Brown, in and upon the right side of the breast of him, the said Josiah Poorboy, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he, the said Josiah Poorboy, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Brown, him, the said Josiah Poorboy, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

2nd count. The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas, aforesaid, upon their oath present:

That John Brown, a white man and not an Indian, on the 8th day of December, A. D. 1891, at the Cherokee Nation, in the Indian country, within the western district of Arkansas, aforesaid, with force and arms, in and upon the body of one Thomas Whitehead, then and there being feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said John Brown, with a certain gun, then and there charged with gunpowder and one leaden bullet, which said gun he, the said John Brown, in his hand then and there had and held, then and there feloniously, wilfully and of his malice aforethought, did discharge and shoot off, to, against, and upon the said Thomas Whitehead, and that the said
3 John Brown, with the leaden bullet aforesaid, out of the gun aforesaid, then and there by force of the gunpowder aforesaid, by the said John Brown discharged and shott of' as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him, the said Thomas Whitehead, in and upon the right side of the breast of him, the said Thomas Whitehead, giving to him, the said Thomas Whitehead, then and there with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the gun aforesaid by the said John Brown, in and upon the right side of the breast of him, the said Thomas Whitehead, one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal wound he, the said Thomas Whitehead, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Brown, him, the said Thomas Whitehead, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

W. H. H. CLAYTON,
United States Attorney, Western District of Arkansas.

(Indorsed on back:) United States vs. John Brown. Murder. A true bill. Lewis R. Hawkins, foreman.

Witnesses: Lord W. Shirley, lives 15 mi. N. E. Talequah, I. T.;
4 Anna Hitchcock, lives 15 mi. N. E. Talequah, I. T.; Sam Manus, lives 15 mi. N. E. Talequah, I. T.; Mary Manus, lives 15 mi. N. E. Talequah, I. T.; Frank Hamilton, lives 12 mi. east Talequah, I. T.; Walter Shirley, lives 12 mi. S. E. Talequah, I. T.; E. H. Bruner, lives Siloam Springs, Ark.; Thos. Caywood, lives 10 mi. west Siloam Springs, Ark.; Wm. Sullivan, lives 15 mi. N. E. Talequah, I. T.; Annie Shirley, lives 15 mi. N. E. Talequah, I. T.; John Roach, lives 15 mi. N. E. Talequah, I. T.; Chas. Lamb, lives at Talequah, I. T.; Dav. Rinks, lives 15 mi. E. of Talequah, I. T.; Florence Blevins, lives 15 mi. N. E. Talequah, I. T.; Brown Hitchcock, lives Vinita, I. T.; Geo. Gest, lives at Talequah, I. T.; Geo. Craigs, lives at Talequah, I. T.; John Shirley, lives at Talequah, I. T.; Thos. Smith, lives at Talequah, I. T.; Watt Langston, lives 15 mi. N. E. Talequah, I. T.; Mrs. Sam. Manus, lives 15 mi. N. E. Talequah, I. T.; Johnson Thompson, lives at Talequah, I. T.; Ned. Still, lives at Talequah, I. T.; Benjamin King, lives at

Talequah, I. T.; Stick Ross, lives at Talequah, I. T.; Chas. Proctor, lives at Talequah, I. T.; Tom Still, lives in Cherokee Nation, near Cincinnatti, Ark.; Ned. Foreman, lives in Cherokee Nation, near Cincinnatti, Ark.; Johnson Corntassel, lives in Cherokee Na., near Cincinnatti, Ark.; Dr. Joseph Thompson, Talequah, I. T.; Henry Bond, Talequah, I. T.; Martha Hale, 5 mi. S. E. Talequah, I. T.; Alex. Wolf, Wauhilla, I. T.; Ned Grease, Talequah, I. T.; John Shirley, Wm. Hale, Watt Hampton.

Filed February 16, 1892. Stephen Wheeler, clerk. By I. M. Dodge, D. C.

4½ In the circuit court of the United States for the western district of Arkansas. Feb. term, 1894. Monday morning, 8½ o'clock, Feb. 19, 1894.

Court met pursuant to adjournment. Present: The Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES *vs.* JOHN BROWN. } Indictment for murder, No. 40.

On this day in obedience to a mandate of the Supreme Court of the United States—

It is hereby ordered that the verdict of guilty heretofore returned by the jury in this cause be, and the same is hereby, set aside and held for naught, and that this cause be docketed, and the said defendant, John Brown, awarded a new trial.

5 In the circuit court of the United States for the western district of Arkansas. May term, 1894. Friday morning, 8½ o'clock, May 18, 1894.

Court met pursuant to adjournment. Present: The Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES *vs.* JOHN BROWN. } Indictment for murder, No. 40.

Whereas a mandate of the Supreme Court of the United States, granting a new trial in this cause, was received and spread upon the records of this court Feb. 19, 1894—

It is therefore hereby ordered that the judgment and sentence of this court upon the verdict of guilty by the jury in this cause be, and the same are hereby, set aside and held for naught.

AUGUST TERM, 1894, *Thursday, Sept.* 6, 1894.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his application, verified upon oath, praying for witnesses in his behalf at the expense of the United States.

MONDAY, *Sept.* 17, 1894.

(Caption omitted.)

On this day come on to be heard the application heretofore filed for witnesses in this cause, and the court being fully advised in the premises doth allow the same. It is, therefore, ordered that the legal expense of procuring the testimony of Hugh Hamilton, Mrs. Levy Hamilton, Annie Hitchcock, Jennie Christie, Joseph Medlock, Ed. Welch, Cale Starr, Bascom Wright, Mollie Randolph, Eli Wafford, Al. Welkmon, Geo. Myers, Thos. Smith, Benny Caldwell, and Mrs. Edna Caldwell, in
6 behalf of said defendant, be paid by the United States, and that a subpœna be issued for them returnable October 15, 1894.

WEDNESDAY, *Oct.* 17, 1894.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal, and by his attorneys, George A. Grace, esq., and C. J. Frederick, esq.; and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause, and a full and complete list of the witnesses in this cause, and that he has also been served with a full and complete list of the panel of petit jurors and alternates, as selected by the jury commissioners for the present term of this court, more than two entire days heretofore; and the said defendant having heretofore had hearing of said indictment, and pleaded not guilty thereto, it is, on motion of plaintiff, by its attorney, ordered by the court that a jury come to try the issue joined. Whereupon, after counsel for both plaintiff and defendant had exercised, in the presence of the defendant, their full right of challenge under the law, the following jurors were selected for the trial of this cause, to wit, Wm. A. Beesley, Abram L. Brown, John B. Condren, Andrew J. Davis, Robt. S. Edwards, James Isaacs, Tapley W. Montgomery, Jas. T. Phillips, John W. Tennison, Wm. L. Reynolds, Jas. L. Tiner, Thomas Mayes, twelve good and qualified electors of the western district of Arkansas, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence, and having heard a statement of the case by counsel, and there not being time to
7 further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court; and it is further ordered by the court that said jury be kept together, and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

THURSDAY, *Oct.* 18, 1894.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal, and by his attorneys, Geo. A. Grace, esq., and C. J. Frederick, esq.; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit, Wm. A. Beesley, Abram L. Brown, John B. Condren, Andrew J. Davis, Robt. S. Edwards, James Isaacs, Tapley W. Montgomery, Jas. T. Phillips, John W. Tennison, Wm. L. Reynolds, Jas. L. Tiner, Thomas Mayes, who took

their seats in the jury box, and after hearing a portion of the evidence, and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

FRIDAY, *Oct.* 19, 1894.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal, and by his attorneys, Geo. A. Grace, esq., and C. J. Frederick, esq.; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit, Wm. A. Beesley, Abram L. Brown, John B. Condren, Andrew J. Davis, Robt. S. Edwards, James Isaacs, Tapley W. Montgomery, Jas. T. Phillips, John W. Tennison, Wm. L. Reynolds, Jas. L. Tiner, Thomas Mayes,
8 who took their seats in the jury box, and after hearing the remainder of the evidence, and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

SATURDAY, *Oct.* 20, 1894.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal, and by his attorneys, Geo. A. Grace, esq., and C. J. Frederick, esq.; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit, Wm. A. Beesley, Robt. S. Edwards, John W. Tennison, Abram L. Brown, James Isaacs, Wm. L. Reynolds, John B. Condren, Tapley W. Montgomery, Jas. L. Tiner, Andrew J. Davis, Jas. T. Phillips, Thomas Mayes, who took their seats in the jury box, and after hearing the argument of counsel and receiving the instructions of the court, retired, in charge of the sworn bailiff aforesaid, to consider of their verdict, and after a short time returned into court the following verdicts, to wit:

"We, the jury, find the defendant, John Brown, guilty of murder, as charged in the first count of the within indictment, for feloniously, wilfully, and with malice aforethought killing Josiah Poorboy."

(Signed) JAS. T. PHILLIPS, *Foreman.*

"We, the jury, find the defendant John Brown guilty of murder, as charged in the second count of the within indictment, for feloniously, wilfully, and with malice aforethought killing Thomas Whitehead."

(Signed) JAS. T. PHILLIPS, *Foreman.*

9 Whereupon, by order of the court, the jury was discharged from the further consideration of the case, and the said defendant was remanded to the custody of the marshal to await final sentence, the defendant, by his counsel, having filed his exceptions to the charge of the court in this cause in the presence of the jury and before they retired to consider of their verdict herein.

WEDNESDAY, *Oct.* 31, 1894.

(Caption omitted.)

On this day come the said defendant by his attorney and files his motion to set aside the verdict of the jury and for a new trial in this cause.

THURSDAY, *Nov.* 1, 1894.

(Caption omitted.)

On this day come the said defendant in custody of the marshal and by his attorney, and the motion for a new trial in this cause coming on to be heard, and the court, being well and sufficiently advised in the premises, doth overrule said motion, to which ruling of the court the defendant at the time excepted.

(Caption omitted.)

On motion of Jas. F. Read, esq., attorney for the western district of Arkansas, the said defendant, John Brown, was brought to the bar of this court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned against him by the jury in this cause on the 20th day of October, 1894, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen and by the court well and
10 sufficiently understood, it is considered by the court that the said John Brown be deemed, taken, and adjudged guilty of the crime of murder, for wilfully and of his malice aforethought killing Thomas Whitehead, and it is ordered by the court that the marshal of the said district aforesaid cause the said John Brown to be taken hence and him, the said John Brown, safely and securely keep from the date hereof until Thursday the 27th day of December, A. D. 1894, and on that day and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said John Brown to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon, on Thursday, the said 27th day of December, in the year of our Lord one thousand eight hundred and ninety-four, cause the said John Brown to be hanged by the neck until he is dead. And it is further considered by the court that the United States of America do have and recover all their costs in this behalf laid out and expended, and that they have execution therefor.

And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of the judgment, sentence, and order, which shall be returned by said marshal with a full and true account of the execution of the same.

And it is further ordered by the court that sentence on the verdict of guilty of murder heretofore returned against the said defendant, John Brown, for the killing of Josiah Poorboy, be postponed to await the result of the judgment against him for killing Thomas Whitehead.

11 THURSDAY, *Nov.* 1, 1894.

(Caption omitted.)

Ordered by the court that defendant have until Nov. 10, 1894, in which to file his bill of exceptions herein.

SATURDAY, *Nov.* 10, 1894. (November term, 1894.]

(Caption omitted.)

Ordered by the court that the defendant have further time until Nov. 15, 1894, in which to file his bill of exceptions herein.

THURSDAY, *Nov.* 15, 1894.

(Caption omitted.)

Ordered by the court that further extension of time, to Nov. 27, 1894, in which to file his bill of exceptions in this cause be allowed.

TUESDAY, *Nov.* 27, 1894.

(Caption omitted.)

On this day come the said defendant by his attorney and presents his bill of exceptions, and asks that the same be signed, filed, and made a part of the record in this cause, which is accordingly done.

SATURDAY, *Dec.* 1, 1894.

(Caption omitted.)

On this day come the said defendant by his attorney and files his assignment of errors, together with his petition, supported by affidavit, praying for an appeal in this cause at the expense of the United States.

MONDAY, *Dec.* 3, 1894.

(Caption omitted.)

On this day comes the clerk of this court and makes known that a writ of error, taking this cause to the Supreme Court of the United States, has been issued by the said clerk.

It is therefore hereby ordered by the court that execution of sentence heretofore pronounced in this cause be stayed pending the action of the Supreme Court.

12 *Bill of exceptions.*

In the United States circuit court for the western district of Arkansas.

UNITED SATES
vs.
JOHN BROWN. } Murder.

Be it remembered that on this, the 18th, day of October, 1894, same being a day of August term of said court, came on to be tried the above-styled case. The United States, to maintain the issues on its part, introduced and examined the following-named witnesses:

John Shirley, L. W. Shirley, Annie Shirley, William Sullivan, Joseph Martin, Henry C. Barnes, Tom Caywood, Frank Hamilton, Charles Lamb, Watt Hampton, E. H. Bruner, Weeley Shirley, John Roach, Ned Foreman, Tom Still, Stick Ross, Martha Hale, Sam Manus, Mary Manus.

John Shirley testifies that—

He was the son of L. W. Shirley, who died June, 1894. The district attorney then read in evidence the court stenographer's notes of the evidence of L. W. Shirley, who testified in the former trial that the deceased Poorboy and Whitehead were at his house in the Cherokee Nation the night they were killed; that they were armed, one with a pistol, the other with a gun; that they slept in a room to themselves. Awhile after he had been asleep he was awakened by hearing shooting about his gate.

13 Next morning he found both deceased lying in the road dead. Poorboy was an Indian and Whitehead a white man. Whitehead had been stopping at his house for a few days, and was helping do chores

for his board, and claimed to be a detective. He was hunting for Jim Craig, who had escaped from the officers, on a charge of adultery.

Annie Shirley testifies that—

She was the widow of L. W. Shirley and was at home the night the deceased were killed. That Whitehead and Poorboy were in a room next to the gate, and a short while after she had gone to bed, about 9 or 10 o'clock at night, she heard someone in the room saying, "Tell him yes." This was in answer to something that had been said by someone on the outside; what was said on the outside she did not know. She heard both deceased go out of the room, and after they got about to the gate she heard talking. Shortly afterwards she heard guns fire, and she heard a voice say, "Hold on, John Brown, I am your friend," and the reply came, "By God, we are fighters from the West." The moon shone dimly and there was a good many trees in the yard, and so I couldn't see anybody, but simply heard what was said. There were a good many shots fired. Didn't wake her husband who was asleep, but she got up and went to the window and stayed their until shooting was over. Next morning saw the two deceased; one lying in the road, dead, and the other near the road. It was a cold night. Whitehead, the deceased, had some money. I heard him say he had some money. There was no money on his body when we found him the next morning. Whitehead had a pistol when he came there, and Poorboy had a Winchester gun. There was neither pistol nor gun there the next morning. Someone had also taken Poorboy's belt.
14 Poorboy had both a pistol and a Winchester. There were a good many empty cartridge hulls on the outside there the next morning. I can not tell how many shots were fired, but a very great many. While the shooting was going on I looked through the blinds of the window and saw the blaze of many shots. At the same time I heard cursing and swearing. This occurred on the 8th day of December, 1891, and in the Cherokee Nation, in the Indian Territory. Whitehead went out without his coat on. Whitehead was shot in the head, the bullet striking him straight in the forehead, and Poorboy was shot a number of times in the body. Whitehead was lying about 35 yards from the gate, and Poorboy about the same distance and to the right. I thought it was Whitehead who said, "Hold up, John Brown, I am a good friend to you." I thought I recognized his voice. It was not John Roach's voice. The dead bodies were lying near the road, Whitehead on his back and Poorboy on his side.

William Sullivan testifies that—

He lived near the place where the deceased were killed. That he was at home on the night of the killing, which was 9 December, 1891. He went to Judge Shirley's and saw the bodies of the two dead men lying in the road. He helped to carry bodies to Talequah, a distance of about 15 miles. Saw defendant and Hampton pass his house in the road 3 or 4 times. Don't know defendant. He was a mere boy, young looking boyish fellow, had very little beard, a young lad of a fellow. Understood he was staying at Sam Manus's. Mr. Manus's wife was the mother of Waco Hampton. Saw the bullet hole in Whitehead's head. Saw John Brown and Waco Hampton often together both before and after the killing, carrying Winchesters and pistols and running around over the country. Everybody knew Waco Hampton was an outlaw. John Brown was older and larger than Waco Hampton.

15 Dr. Joseph M. Thompson testifies that—

He was a practicing physician at Talequah, and saw both of deceased after they were brought to Talequah on the day after they were killed, and examined their wounds. Found 3 bullet holes in Whitehead, each of which would have been fatal; one in the head, one near the umbilicus. Took out 2 balls. There were three bullet holes in Whitehead's body, and seven in Poorboy's body. Those in Whitehead were in his neck, head, and body; one cut his neck. I could not tell whether it was shot from the front or back. One struck his forehead right in the center. I took that ball out. It was a large ball, 44 or 45. Another entered his abdomen a little to the right of the center line, going through his body, ranging upward and lodging under the skin on back side about the middle of the left shoulder. That ball appeared to have been shot while deceased was lying on his back. I cut three balls out of Poorboy. He was shot three times in the arm, twice through the body, and once in the side of the face, and once in the nose. I exhibit 4 balls that I took out—one from Whitehead and three from Poorboy. I think the hole in the head of Whitehead was made with a large ball.

Henry C. Barnes testifies that—

He lives at Talequah; he saw bodies at Talequah after they were brought there—the day after they were killed. Was present when Dr. Thompson made examination of their wounds, and makes the same statement that Dr. Thompson does.

Thomas Caywood testifies that—

16 He lived in the Cherokee Nation in 1891, and had seen the defendant, John Brown, a few times. Was at Annie Hitchcock's the night of the killing. Annie Hitchcock lived about a quarter of a mile from where the deceased were killed. About dusk of the night of the killing, the defendant, John Roach, and Waco Hampton came to Annie Hitchcock's. They were sitting around the fire talking and laughing with Annie Hitchcock. Don't know what they came there for. The defendant had Winchester gun, and John Roach had double-barrelled shot gun. Didn't notice pistols on either one, nor belts. They stayed there something near three-quarters of an hour, sitting around the fire talking and laughing and going on. They had some whiskey with them; they passed it around. Florence Blevins was there living with Annie Hitchcock. After they had been there a short while they got on their horses and rode off. Can't tell which way they went, but they went off on horseback; saw them about three-quarters of an hour afterwards talking at Annie Hitchcock's place. John Brown and John Roach came in first; Roach had double-barrelled shotgun, and Brown had a Winchester; Waco Hampton came in shortly afterwards and had a Winchester and 2 pistols—six-shooters. When they came in, the first words Roach said, he said he was shot; told me to take his gun. I asked him if it was loaded; he said it was; he never fired a shot. I examined the gun and it was loaded. We went then to taking care of them. They all tried to tell about the difficulty of the fight. I can't tell exactly how they did tell it; they were all drinking. Afterwards Hampton came in and tried to tell me how it was. He told me he killed a couple of fellows up the road—two marshals. Said one was that "damned old Heck Brüner." Waco Hampton said all he hated was

Roach was in it, and was innocent. I asked John Brown the defend-
17 ant, "Sure enough, did you kill somebody up the road?" He said, "Yes; we laid out two marshals." I replied back to him, "Sure enough?" He says, "That is no damned lie." They didn't say who the marshals were, any more than what Waco Hampton said. He said one of them was that "damned old Heck Bruner." Hampton had me examine the gun; said he had taken it away from Heck Bruner, and asked me if I wouldn't know Bruner's gun. I told him there were so many Winchesters alike I wouldn't know the gun. I said to him I had seen Heck Bruner with a gun that looked a good deal like that. There was blood on the gun. Don't know whether gun was loaded or not. Think it was a 38 caliber. The Winchester defendant had was a 44. Waco Hampton had some belts. They didn't say anything else about getting anything except the gun. They set there about half hour or three-quarters and went away. John Roach lives about a mile from there. They left him there. He stayed there until the marshals came and got him. After Waco Hampton and defendant, John Brown, had remained something like half an hour Waco said to Brown, "John, it will not do for us to remain here; we must leave." John agreed to it, and they left. Hampton and John Brown did not say why they left Annie Hitchcock's and went off with John Roach; neither did Annie Hitchcock. They did not give any excuse for leaving. Annie Hitchcock did not ask any of them why they were leaving. They did not say why they brought Roach to Hitchcock's, instead of taking him to his own home, which was not far away. Jim Craig was at Annie Hitchcock's, but I am not sure whether it was before or after Waco Hampton, John Roach, and defendant were there first time. I know Jim Craig was there before these parties returned after the killing. Defendant, John Brown, said: "We killed two marshals," and when I said, "Sure enough?" he said, "That is no lie." They claimed that Roach was innocent.

18 Frank Hamilton testifies that—

He lives about 4 miles from where deceased were killed. He knows defendant and Waco Hampton. He saw Waco Hampton and defendant at his house next morning. They came there sometime in the night. They slept out in *in* the stable loft. Each one had a Winchester, and defendant was carrying one and Waco Hampton the other and had two pistols, and defendant had one pistol and a new belt. Jim Craig came there that morning about sun-up. He *w*was riding horseback and was armed with two pistols. Waco Hampton was scouting to keep out of the way of the marshals. He had escaped from reform school about 3 or 4 months before then. Jim Craig was scouting. He had escaped from the officers. He was charged with adultery. He had known defendant for 2 or 3 years. Had seen Waco Hampton and defendant together about a month before killing. They were armed and were riding over the country. Defendant was working for Sam Manus, step-father of Waco Hampton. Defendant and Hampton told me they had gotten into some trouble down there with some fellows and had killed two men. Hampton said he thought one was Heck Bruner; it was a deputy marshal. They said they had been up the creek a piece and were coming on back. These men, the deceased, came out on them and caught hold of their horses bridles and told them to halt and to get down, and they got down and

went to shooting. Hampton said he got down and went to shooting. They came there to get my father to go down see Roach. My father was a practicing physician. They didn't say who shot Roach, except they thought the men shot him; that is, the deceased, Poorboy and Whitehead. The defendant and Hampton then went home. They left about 8 o'clock in the morning. The defendant said he had to shoot to save his
19 own life; that the other fellow was shooting at him. John Brown was carrying his pistol in a belt which he had around him. I had not heard of the killing before they came. I did not know they were on the above (premises) before next morning. They told me they had slept in the stable. John Brown and Waco Hampton then told me they had killed two men down there. Waco Hampton said he killed Poorboy and John Brown, the defendant, said he killed Whitehead. He did not use the name Whitehead, but said he killed one. Waco Hampton thought the man he killed was a marshal and was Heck Bruner. Defendant said he just shot his man and killed him. He said he did it in self-defense. Brown and Hampton said they supposed Poorboy and Whitehead shot John Roach. Brown and Hampton left my house together. Jim Craig was present while they were there. They had a conversation with Craig. I do not know how they happened to meet at my house. Craig did not, in my presence, discuss the killing with Brown and Hampton. Craig was riding Annie Hitchcock's horse and the defendant was riding John Roach's horse. They said they had killed the men down at Shirley's. Waco Hampton said that he and Brown did the killing; that the men came and took hold of their bridle reins and they shot them.

Charles Lamb testifies that—

He was a deputy marshal in 1891 and he arrested Jim Craig on charge of adultery with Brown Hitchcock's wife, and he escaped from him, and he put out a $10.00 reward for his re-capture; that he told deceased, Poorboy, about the offering of the reward for the re-capture of Craig; didn't know defendant; never saw him before he was arrested. Brown Hitchcock had also offered a reward for the capture of Craig. I authorized Poorboy to hunt for and arrest Craig. I sent him down to hunt
20 for and to capture Craig. I sent him to the neighborhood of old man Shirley's, where the killing occurred. Poorboy started down to Judge Shirley's about 10 o'clock on the morning of the day of the killing. Poorboy got a pistol before he started over there. Poorboy was acting as a guard for the authorities at Talequah when I got him to go over to Judge Shirley's in search of Jim Craig. I had arrested Craig on a charge of adultery with Annie Hitchcock.

E. H. Bruner testifies that—

He was a deputy marshal in December, 1891. He arrested defendant; went to Sam Manus's and found him in bed. Defendant had two guns in the room, one across the bed and the other lying on the table. Charley Copeland, another deputy marshal, and two others were with me at the time, and they had been looking for Waco Hampton on the day before, and had found him down near the mountain, and in the fight Hampton was killed. They took him to Annie Hitchcock's, and he was identified as Waco Hampton. When we arrested defendant he was sleeping on a bed undressed. He tried to get his Winchester to shoot us when we run in on him, but we grabbed hold of him and took the gun away from him. We

had a warrant for Waco Hampton when he was killed, and prior to that, and at the time he and Brown killed Poorboy and Whitehead, there was a warrant for Hampton's arrest in the hands of the marshal and we were looking for him. He was evading the officers. Jim Craig was doing the same thing. We searched all over that country for Brown, the defendant, and Hampton. They eluded us. When the defendant was captured we slipped upon the house and he did not know we were there until we had hold of him, or nearly so. He then grabbed his gun to shoot, but we took it away from him. We had been watching him and Waco
21 Hampton for two days, but they were intrenched and we thought too dangerous to attack them until they separated.

Weeley Shirley testifies that—

He is the son of Judge Shirley; that he lived a mile and a half north of his father's at the time of killing of deceased. I heard the shooting; heard some 15 or 20 shots. It was about 9 o'clock. Was in bed sick at the time. Hitchcock and Poorboy, one of the deceased, were at his house the evening of the killing; came there and borrowed his Winchester. It was a 38 Winchester. He got gun back, after Hampton was killed, from Heck Bruner. Hitchcock stayed all night with him that night. The gun was borrowed for Poorboy. He took it. He wanted it to arrest Jim Craig.

John Roach testifies that—

Lived about a mile from Shirley's, the place where the killing occurred. He lived about the same distance from Annie Hitchcock's. He went to Annie Hitchcock's on the evening of the killing a little after dark. Annie H. had sent for him to come over there; she wanted to see him. He took his shot gun with him and went alone on horseback. When he got there he found Florence Blevins and Tom Caywood and Annie Hitchcock. John Brown and Waco Hampton came in shortly afterwards. Hampton had a pistol and Brown had a Winchester. They didn't say what they came for. Annie Hitchcock wanted me to go up and meet Jim Craig up to Cob Hill, about 2 miles above her house. Annie Hitchcock took Waco Hampton aside and talked to him. Shortly afterwards defendant Brown, Waco Hampton, and myself started off to Cob
22 Hill to meet Jim Craig. I do not know why they went with me; I did not ask them. We started soon after Mrs. Hitchcock had the private conversation with Waco Hampton. They had a little whiskey along and was drinking some. As we went up to Cob Hill we passed Judge Shirley's place, where the deceased were killed. When we got up to Cob Hill we failed to meet Craig, and we started back the same way we came. On the hill above Judge Shirley's Waco Hampton shot his pistol off. He did not say why; nobody asked him why. Shot pistol in air. As we came back we were talking along the road. We got down about Shirley's place. About even with the house Waco Hampton turned his horse off and said he wanted to see Whitehead. Me and the defendant went on, and defendant said: Let's stop and wait for him. I said: No; let's call Waco, and Waco was standing there calling Whitehead. Finally Poorboy and Whitehead came out, and Poorboy said he was Heck Bruner. Waco started off and Bruner, or Poorboy, caught Waco's horse by the bridle, and Whitehead came up to me and told me to get off from my horse and consider myself a prisoner. John Brown was riding on

same horse with me, behind me. I got off from horse next to Whitehead. He told me to lay down my shot gun and I lay it down, and when I went to raise up somebody shot me in the arm, but I could not tell who done it. I was shot in my arm and shoulder while I was holding my horse with my left hand. The horse jumped and jerked me down, and I got up and went off, and don't know who shot. After I got off a ways I looked back and saw defendant shoot one shot with a Winchester at Whitehead from where I started from. Whitehead was laying on ground and Brown shot one shot. The defendant rather ran upon Whitehead and shot him. He seemed to shoot him in the stomach. Poorboy was out at Waco. Didn't look back any more, but went on
23 Poorboy had a gun at the time he went to Waco and Whitehead had a pistol in his hand at time he told me to get down off from my horse. When Whitehead came up to where defendant and I were on our horse, and told me to consider myself a prisoner, I told him all right. He said, Are either one of you Matthews or Jim Craig? I told him no, and he said, I know you are, so get down and consider yourself a prisoner and defendant Brown got down on one side and I got down on the other side of horse. I got down right next to him, Whitehead. Don't recollect now how Whitehead was holding pistol; saw him with pistol in hand at time he asked me if I wasn't Matthews or Craig. When he told me to get down and consider myself a prisoner, as soon as I struck the ground he told me to lay down my gun. He claimed to be an officer. Poorboy went to Hampton at the same time Whitehead came to us. Poorboy walked around in front of Hampton and spoke to him, and then Whitehead left them and came on up to where we were and told us to consider ourselves a prisoner. At that time none of us had made any demonstrations whatever to any of them. Neither I nor the defendant, John Brown, said a word to them except that neither of us were Matthews or Craig. Couldn't tell who fired the first shot. Poorboy caught Waco Hampton's horse by the bridle and told him to surrender. Waco said, Hold on, my hand is cramped on my pistol and I can not turn it loose. Waco then jumped off his horse on the opposite side from Poorboy and fired. I suppose he fired at Poorboy. I could not tell. When Waco went up to the gate, John Brown and I waited for him about 15 or 20 steps away from the gate. Waco called Whitehead to come out. He did not say what he wanted with him. As they (Poorboy and Whitehead) came out to the gate Waco came down to where we were. The first shot
24 that was fired come from the direction of John Brown, the defendant. That shot struck my arm. I was standing on a line between John Brown and Whitehead. The flash came from where John Brown was standing. Then shooting commenced out to my right, where Poorboy and Waco Hampton were. The first shot did not come from that direction. Poorboy told Waco to stop and give up, and that he was a marshal and had a right to arrest him. Whitehead seemed to be talking to me when he said, Consider yourself a prisoner. The defendant, Brown, never spoke a word to Whitehead. After the first shot the shooting commenced rapid and fast. Whitehead was not doing anything at the time the first shot was fired. Whitehead did not fire a single shot. I knew that Whitehead was there at Shirley's. Waco Hampton and John Brown knew it also. John Brown, the defendant, is a white man and not an Indian. Waco

Hampton was an Indian. Poorboy was an Indian. Whitehead was a white man and not an Indian. Waco took Poorboy's gun, and when they caught up with me, John Brown had Whitehead's pistol. When John Brown caught up with me he asked me where my gun was. I told him, and he went back after it. I went on down the road after I got that and when the shooting was all over John Brown and Waco Hampton came on after me. The horses got away, and they caught the horses and we got on them and rode to Annie Hitchcock's. From there defendant rode my horse off. Jim Craig came to Annie Hitchcock's soon after I left. On Sunday before the killing, John Brown, Waco Hampton, Jim Craig, and Florence Blevins where at Annie Hitchcock's.

Ned Foreman and Tom Still, who testified that—

25 On the day of the killing they passed along the road near Sam Manus's house and saw defendant, John Brown, Waco Hampton, Jim Craig, and one or two others shooting at trees. When defendant, Brown, and the others discovered them, they ran to the house and secreted themselves, and when they (Foreman and Still) were opposite the house, defendant, Brown, came out and demanded their names and where they were going, and then asked them if they did not want a gallon. They went on to Talequah that night, and the next day the dead bodies of Poorboy and Whitehead were brought into Talequah. They had been killed on the night before. It was about half-past four in the afternoon when they saw defendant, Waco Hampton, and Jim Craig at Sam Manus's. The killing occurred that night.

John Shirley, who testified that—

I am the son of Judge Shirley. I went to my father's next morning after the killing. Whitehead was lying 6 or 8 feet from the garden fence and about 30 steps south from the yard gate. He was west of the garden fence. He was lying flat on his back. Poorboy was 25 or 30 steps west from Whitehead, and nearly the same distance from the yard gate. From the spot where Whitehead was lying I tracked blood down the road, south, the direction along which Roach said he left. John Brown's Winchester was a .44-calibre.

At this point was read the record of conviction of Waco Hampton for manslaughter.

Martha Hale testifies that—

Knew Waco Hampton and defendant, and that she saw defendant
26 and Hampton together the next evening after of the killing. They came to her house where she was living, and they were talking about the killing. Hampton said the marshals had him in a close place, and if it had not been for defendant, Brown, they would have got him. Brown said yes, that he sure got his man, referring to man killed, and he put up his finger and said he hit his man right in the forehead. Brown never made another remark, except that Hampton did all the talking; said he had been in a pretty close place. I was preparing supper; didn't pay very close attention to what they did say. Hampton said when they got into the fight that deceased said they were hunting for Jim Craig, and when we told them we were not Jim Craig, neither one of us, they said, We will cabbage on to you, anyway, and Hampton said he guessed he peppered their cabbage for them. Hampton showed where he been powder-burned by powder from the man's pistol who was shot. His thumb was burned also. Looked like it had been struck with something.

Sam Manus testifies that—

Lives two miles from place where deceased were killed; that Waco Hampton was son of his wife's by former husband; that John Brown was before that working for him, and he had quit work and had been staying there about six weeks, or such matter, and had been on the scout with Waco. He heard shooting about 9 o'clock the night of the killing, and about an hour and a half or two hours after that the defendant and Waco Hampton came to his house and told him the' had killed Heck Bruner and Tom Whitehead, and they said, Here is the gun and pistol. Showed me the blood on the gun. Hampton said he shot his man in the bowels, and he hallowed for him not to shoot him any more; and Brown said, I shot my man down the first shot. Hampton said to defendant, How much money did you get out of your man's pocket, and defendant said
27 $3.00, and he pulled out $3.00 in silver and showed it. They had a pistol and a Winchester, and they said they got them from the parties; Hampton said he pulled the Winchester out from under Poorboy's body after he fell upon it; defendant said he got pistol from Whitehead—a .44 rubber-handled pistol. Waco Hampton was talking to his mother in Cherokee, but made above statements in English. I am a Cherokee, and my wife is a Cherokee, but understands English language well. When he talks to his mother he talks Cherokee or English In talking to me he talks English. He talked part English and part Cherokee that night. Defendant don't speak or understand Cherokee language. "About sundown on the evening of the killing I met Waco and defendant going towards Hitchcock's. They told me they had been up the creek with Bald Christie and Ned Pigeon. These two (Pigeon and Christie) were on the scout. They were both riding. Defendant said he got three dollars in silver from Whitehead, and that he killed Whitehead the first shot; that defendant had a rubber-handled .45 pistol. John Brown, the defendant, had around him a new belt which he said he took from Whitehead. Hampton said that his man did not have any money. They said that Roach got that, and that Roach did not have anything to do with the killing. Defendant said he shot Whitehead in the forehead. Waco Hampton said in the presence of John Brown that he (Waco) shot Poorboy in the bowels and John Brown shot Whitehead in the head, and then John Brown whooped, and while Poorboy was begging for mercy John Brown shot Poorboy with his gun. He spoke that in English. The only thing he said in Cherokee was, "If you do not believe me, here is the gun and pistol, and blood on it." They said they got two pistols and a gun. Defendant, John Brown, is a white man and not an Indian.

28 Mrs. Mary Manus testifies that—

She is a Cherokee. Understands English language, but does not speak it. Understands it well. Her children always speak to her in English at home, and she answers them in Cherokee. She is the mother of Waco Hampton, and wife of Sam Manus. Waco Hampton had been occasionally staying at home 3 or 4 months before he was killed. He was upon the scout. Defendant John Brown was on the scout with Waco for about 6 weeks. Her son, Waco Hampton, and defendant were together a great deal. They generally went armed. On the night of the killing of deceased they came home and Waco Hampton and John Brown said they had killed two or three men. Two marshals. Said Waco Hampton said he killed

one, and defendant said he killed the other. They each one had a Winchester and a six-shooter. Got Winchester from Poorboy, and pistol from Whitehead, they said. Defendant said he had got some money from Whitehead. Got $3.00. Defendant does not understand Cherokee language. Defendant said he shot Whitehead in the forehead.

The district attorney then offered to read in evidence the record and conviction of Jim Craig for adultery, in the United States court, to which the defendant at the time objected, but the court overruled the objection, and the district attorney read the record, which is as follows:

In the district court of the United States for the western district of Arkansas, Aug. term, 1892, Friday morning, 8½ o'clock, Sept. 2, 1892.

Court met pnrsuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES, vs. JAMES CRAIG. } No. 2246. Indictment for adultery in the Indian country.

29 On motion of Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, the said defendant James Craig was brought to the bar of this court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned against him by the jury in this cause on the 1st day of Sept., A. D. 1892, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon the premises being seen, and by the court well and sufficiently understood, it is considered by the court here that the said James Craig, for his felony aforesaid, be imprisoned in the house of correction, situated at Detroit, in the eastern district of Michigan, for the term and period of three (3) years from this date, and that he pay to the United States of America all their cost in and about this prosecution laid out and expended, and that they have execution therefor.

It is further considered, that the marshal of the western district of Arkansas, to whose custody the said James Craig is now here committed, receive and safely keep and convey the body of the said James Craig hence to said house of correction in the State of Michigan, without delay, and deliver him to the custody of the keeper of said house of correction, who will receive and safely keep the said James Craig in jail in execution of the sentence aforesaid, and in conformity with the same, for the full period of time aforesaid. And it is further ordered that the clerk of this court furnish the marshal of this district with two duly certified copies of this judgment, sentence, and order, one of which shall be delivered to the keeper of said house of correction and the other returned by the marshal to this court, with a full and true account of the execution of the same.

30 To which ruling of the court the defendant at the time excepted.

The district attorney then offered to read in evidence the indictment against Jim Craig. The defendant objected to the reading of the

indictment. The objection was by the court overruled, and the defendant excepted. Whereupon the district attorney read the indictment, whereupon the defendant again renewed the objection to the introduction of the record and conviction of Jim Craig for adultery, and the indictment upon which he was convicted. Court overruled the objection and admitted it to be read in evidence, and the defendant at the time excepted. The district attorney then read the record of the conviction of Waco Hampton, to which the defendant at the time objected; which objections were by the court overruled, and the defendant at the time excepted.

The defendant, to maintain the issues on his part, introduced and examined the following-named witnesses:

Bascom Wright, Alford Wilkinson, Hugh Hamilton, W. G. Holland, Malley Randolph, F. A. Colwell, Joseph Medlock, Jennie Christie, Monroe Hamilton, Mrs. Lela Hamilton, John Brown.

F. A. Colwell testifies that—

I have lived in Territory about two years; am not a citizen there. He had known defendant for about five years; that defendant had been making his home at Mrs. Manus's for quite a while before the killing of the deceased. He knew his general reputation before difficulty as being a peac'able and law-abiding man, and his reputation in that regard was good. He saw defendant and Waco Hampton at his house next morning after killing. He lived 8 or 9 miles from Manus's. He learned
31 from them that deceased had been killed. The defendant had been with Waco Hampton scouting with him under fear. I do not know why defendant stayed with Waco Hampton.

The defendant then offered to prove by this witness a conversation between himself and Waco Hampton some time before the killing.

This the court would not permit defendant to prove, to which ruling of the court the defendant at the time excepted.

Bascom Wright testifies that—

I am not a citizen of the Indian Territory. He knew the general reputation of defendant as being a peac'able, law-abiding man, and that his reputation was good. There are now against me in this court four indictments for introducing and selling whiskey in the Indian country. I am 18 years old.

Hugh Hamilton testifies that—

He has known defendant since 1878. First known him in the State of Arkansas, afterwards in the Cherokee Nation. He has known the reputation of the defendant as being a peac'able and law-abiding man for a long time, and that his reputation was good.

The district attorney, on cross-examination of the witness, asked this question: Did you know of John Brown or did you hear of his having introduced whiskey up there at any time? To the asking of which question the defendant at the time objected; which objection was by the court overruled, and the defendant at the time excepted. Witness then
32 went on to state that he knew the defendant had had whiskey in the country and that it had been charged against defendant that he was a whiskey dealer.

W. G. Holland, Malley Randolph, and Joseph Medlock, testified that—

W. G. Holland is a boy 18, Malley Randolph is a girl 16, and Joseph Medlock is a boy 20, and the first and last have been arrested on whiskey

charges. They are acquainted with the general reputation of Sam Manus for truth, and that it was bad.

Jennie Christie testifies that—

She was acquainted with defendant. She saw defendant shortly after the difficulty, and she saw a round hole in pants of defendant near the knee. Look like it had been shot, where the bullet had come in and gone out. That was four or five days after the killing that she saw it.

Monroe Hamilton testifies that—

He knows the reputation of defendant, John Brown, as being a peaceable and law abiding man and that it was good; and Monroe Hamilton says that he himself has been arrested for introducing and selling whiskey.

Mrs. Lela Hamilton testifies that—

She had known defendant for 15 or 16 years, and in fact had known him pretty much all his life, and that his reputation as being a peac'able and law abiding man an' citizen was good. She saw defendant next morning after difficulty; he was with Waco Hampton at her house, and she noticed that Hampton's eyes were all black, looked like they were powder burnt, and all one side of his face looked just like it does when it is all powder burnt.

33 The defendant testified in his own behalf that—

At time of killing he was 19 years of age; that he was reared in Searcy County, Arkansas. They came to Indian country from Ark. in the year 1889; that he worked on a farm; that he had been working for Mr. Manus a few weeks prior to the killing of deceased, about 3 weeks, he thinks, helping Mr. Manus build a barn, and that on the evening of the killing he went with Waco Hampton down to Annie Hitchcock's; started from Mr. Manus's; it is about 2 miles from Annie Hitchcock's; got there about dusk. Got there, Annie Hitchcock, Tom Caywood, Florence Blevins, and John Wolf were there. Carried a 44 Winchester; it was the gun of Waco Hampton's; just carried it along because I was riding behind on the horse with Waco Hampton. Hampton had some whiskey, but at that time when they started he was sober. Took about two drinks that day. Short while after they had got to Annie Hitchcock's Hampton came to him and told him he wanted him with him up the road about two miles; wanted to see a man up there, he said. I told him I didn't care; I had no special business and would go, and Joh' Roach went with us. Rode two horses; defendant rode behind Roach on same horse, and Hampton rode another horse. Had no thought of getting into any trouble or difficulty with anybody. We didn't know Poorboy or Whitehead. Didn't know they were at Judge Shirley's. Went up the road about two miles, and turned around and came back. We came a riding along talking and laughing. My understanding was Roach had promised to meet Jim Craig at the place where we went. When we got there didn't find him, and we came on back. We went by the place where deceased were killed. Waco Hampton went on to the house, while the horse Roach and I were riding stopped at a little branch

34 to drink, and the men that were killed came out of the house and were talking, the first that we noticed. Didn't hear Hampton calling. The men were both on the outside of the gate when I saw them. Roach and I rode past them, and Hampton said, "Hold on,

boys, a moment." Roach stopped his horse, and about that time Hampton started on towards where we were. He came on right close to where we were, and the men came on with him—came on behind him. I says to Hampton, "Are you through with these men?" and he says, "Yes;" and I says, "Let's go on," and he says, "All right." About that time one of the men grabbed Hampton's horse by the bridle reins and says, "Where are you fellows going?" I didn't think it was any of his business, and says, "Guess we are going to hell." He says, "I guess, by God, we will just cabbage on to you fellows right here, anyhow." He had his Winchester pointed towards Hampton's head, holding bridle with one hand and gun with the other. He says, "Get down off from your horse, and that damned quick," or something of that kind, and Hampton sprang from his horse on opposite side of where the man was that was talking to him and commenced firing; that was the first firing that I recollect. The other fellow came up and asked if I were Matthews or Jim Craig. Roach told him we were not. He said, well, get down, and we both dismounted, and about that time Roach got down and walked around in front of his horse, and the fellow said, "Lay down your gun." I just set the end of my gun down on my foot like, and held the barrel in my hands. Didn't throw it down. Never noticed whether Roach throwed his down or throwed it down. But I suppose he got rid of it some way. These men that were killed were shooting, but I knew nothing about what was up. First shooting occurred with Hampton and the other man that he killed, and about that time I felt something strike my pants, and I thought I was shot, and I sorter turned around, and there was so much shooting I couldn't tell what it was that hit my pants. I thought at the time I was shot, because there was so much shooting. I heard Roach hallow, "Boys, I am shot," or something. About that time Hampton had killed his man and was shooting at this other man, and I drew up my gun and fired only one shot, or tried to fire; am not sure whether I fired or not. After this I went to Mr. Manus's with Waco Hampton, and we didn't know who the men were that were killed. Didn't show any money to Mr. Manus or his wife. Didn't take any money or anything else from either one of the deceased. I went from there to Mr. Hamilton's, and then stayed with Hampton more or less for 2 or 3 days, and then went back to Mr. Manus's and was there in bed when I was arrested. The defendant then closed the evidence.

The district attorney by way of rebuttal offered to introduce Watt Hampton. The defendant objected to his testifying in the case because he had not been served with notice of him as a witness, as the law requires. The objection of the defendant was by the court overruled, and the defendant at the time excepted. The name of Watt Hampton was not endorsed upon the indictment nor contained in the notice served upon the defendant as a list of witnesses for the prosecution.

The Government then by way of rebuttal introduced the following witnesses and citizens of the Cherokee Nation, each of whom testified that the general reputation of Sam Manus, in the neighborhood where he lives, for truth was good, to wit:

Ned Grease, age 50 years; Walter Shirley, age 35 years; John Shirley, age 30 years; Tom Still, age 53 years; Ned Foreman, age 51 years;

William Sullivan, age 46 years; Alex Wolf, age 49 years; George Guest, age 48 years; Tom Smith, age 43 years.

The court then charged the jury as follows:

36 In the circuit court of the United States, within and for the western district of Arkansas. August term, A. D. 1894.

UNITED STATES
vs.
JOHN BROWN. } Murder.

Charge of court.

OCTOBER 20TH, A. D. 1894—4.00 o'clock p. m.

PARKER, J.:

Gentlemen, the Government, by its grand jury, charges in this case that two human lives have been taken by the defendant—the lives of Josiah Poorboy and of Thomas Whitehead. The charge, which is presented by a lawful body of the Government of the United States after having investigated this case, calls on us to make inquiry if the law of the land has been violated so as to make these charges against this defendant a crime. It becomes our duty, as a court and jury, to investigate this case to see whether there has been a violation, or violations, of the law. We can do this properly but in one way, and that is the way that the law prescribes.

You have been told in argument in this case that the Government has a purpose to subserve in this prosecution. Whether that was
37 intended as an insinuation of something improper upon the part of the Government, or anybody connected with it, I know not; but, if that is the intention, it is my duty, as a court, to refute all such purpose.

Mr. GRACE (of counsel for defendant). Pardon me one moment. Brother McDonough, the assistant district attorney, said that. I had no such intention as that. I do not think I ever said anything of the kind. I certainly had no intention of attributing anything wrong to the Government, or to the officers of the Government, except the desire was to prosecute this defendant on evidence that was properly against Wakoo Hampton.

The COURT. I say the Government has a purpose to subserve in this prosecution, and that purpose is to find out from the evidence in this case, through twelve intelligent, honest, impartial, and fearless jurymen, what the status of this case is—that is, to ascertain whether or not the law of the United States has been violated; if it has been violated by the commission of the crime of murder, to say so, as becomes such gentlemen under their obligations which they have assumed, and which are resting upon their consciences, demanding that if the law of the nation has been violated by the commission of the crime of murder, or by the commission of any other crime, that they will assist in the vindication of that law as honest men and as good citizens. That is the purpose of this prosecution, and no other.

Now, while you are sitting as jurymen, it becomes your duty to be governed by the law as given in the case by the court, and by the evidence

which you find to be true which has been offered in the case. This
38 is a rule that is imperative upon you in this case. It becomes my duty, in my judgment, to say to you that you are not to be governed or influenced by the fact that this case has been once before the Supreme Court of the United States, and that the judgment of this court in the case has been reversed by it. You are not to be influenced in the least by that fact. The Supreme Court reversed the case on the admission by this court of an item of evidence which has not been offered at this trial. It was alone on this ground that the case was reversed. That action does not touch either the facts which have been offered before you as evidence, or the law which will be presented to you when you have heard the whole charge.

First, then, we are to look at the nature of this charge to see what it is. The defendants stands before you charged with having committed two murders. The first count in the indictment charges him with murder, because, on the 8th day of December, A. D. 1891, in the Cherokee Nation and in the Indian country, he willfully, and with malice aforethought took the life of Josiah Poorboy, by shooting him with a gun. The second count of the indictment charges that upon the same day, in the Cherokee Nation, in the Indian country, he willfully, and with malice aforethought, took the life of Thomas Whitehead, by shooting him with a gun. These are laid by the Government as different accusations, as two separate offenses, and it becomes your duty to pass upon both of them. You are to see whether the killing was done by the defendant alone, or done in connection with Wakoo Hampton in such a way as that, under the principles of the law that I will give you in the course of the charge, would make the
39 defendant responsible for both acts. In order to pass upon these charges intelligently, you are to know what is required to be found by you to make out the crime or crimes that are charged. You will understand that, under the law of the United States, there are but three conditions that can arise out of the taking of human life. One is a state of case where the law gives the right to take life; another is a state of case where, because of something done by the party who is killed, the taking of the life is not of that high grade of crime known as murder; and the other is a state of case where the facts and circumstances show the taking of a life in such a way as that the law defines it as murder. You are to ascertain in this case whether the crime of murder, as laid in these counts, exists, or, first, you are to find if a crime has been committed, and, secondly, what is the character of that crime. You are to know what the law requires to be found, and you will learn this when we come to define the crime of murder. The definition will apply equally to both of these cases—that is to say, it is not necessary to repeat the definition because of there being two charges. The only difference between them in their essentials under the law is the names of the parties who were killed. Different persons are charged to have been killed. First, then, in order to make out the charge in the first count of the indictment, you are required to find that Josiah Poorboy is dead; and the same element is to be found in the second count of the indictment before you can intelligently pass upon that—that is, that Thomas Whitehead is dead. You are to find first the fact that they are dead. There is no contention over that fact, and if there was any con-
40 tention upon that proposition you will go to the proof to see whether it establishes beyond a reasonable doubt these propositions, and if

it does you may safely take it as established without any further investigation. The second proposition is that they died because they were shot with a gun or pistol—that is to say, they died from the effects of a gun or pistol shot. The allegation in the indictment as to the means used is that it was a gun that was used. If the proof shows it was a pistol, it is equally responsive to the allegation, because they are weapons in the law of the same kind or character.

If there is any contention over the proposition as to the means used in producing the death of these two men, you go to the evidence, and if that testimony shows, as in the first proposition, beyond a reasonable doubt, that the means set out in the indictment were the means that produced the deadly result as affecting these two parties who are alleged to have been killed, you may lay that proposition aside as one established. The third proposition is that these acts, or the infliction of these gunshot or pistol shot wounds, were so done that the act or acts which resulted in the death of these two men were willfully done, and done with malice aforethought. When you find these things existing that I have enumerated you have then found that the lives of two human beings have been taken in such a way as that two murders have been committed. That is the first general proposition that is to be found in every charge of the character laid against this defendant—that is, that a crime such as is charged was committed. That, in the law, is called the body of the offense. But you can not tell whether that crime has been committed, although you have the facts before you; you
41 have the reproduction of this occurrence as far as it may be produced, not by the tragic re-enactment in your presence of it, but by a recital of those bloody and tragic facts that surrounded it. In that way the transaction which resulted in the death of the two men who are named in the respective counts in this indictment, their killing, and the circumstances surrounding the same, are reproduced before you in the only way they can be produced. If you have found that fact, then you are to bring this condition home to the defendant, to see whether he is the author, either, as I have told you, while acting alone or in concert with another; that under the rules of the law would make him responsible for the acts of the other, whether he alone did that, or that, with others, he is the author of the deaths of these men in such a way as to produce that condition that I am now about to define to you as a condition of murder.

You are to understand that you are to hold fast, with all the tenacity of which your minds are capable, in the trial of cases of this character, to the circumstances surrounding the transaction, because they go to characterise it. They go to tell what sort of a transaction it was. It is not by what may have taken place long afterwards that you are to characterise the occurrence, but you are to take that which occurs at the time of the killing, or which may be connected with it as a result growing out of it, in the shape of the exhibition of the fruits of it, of the fruits of the act done, in the shape of money taken by robbery, if that be the evidence. You are to ascertain what the true status of the case is, and what the true
42 character of the transaction was. Your observation in life as men of mature years, as men of experience—not of experience in matters of this kind, but, more appropriately speaking, as men of observation upon the conduct of others—which enables you to name the transaction when you have the facts given you, provided you have what the law requires to

make a crime. In other words, you must have what the law defines to be the crime of murder. I have given you some of the essentials of it. I have told you in general terms that it must be a killing that is willfully done, and done with malice aforethought. But the law does not permit me to stop there. It says that you are to receive further light upon these expressions which enter into this crime, into the fact that it was done willfully and done with malice aforethought. In other words, you must go to the law to find what definition the law attaches to these expressions, because your oath requires you to try the case by the law and the evidence. It is by the legal definition of the expressions you are to be governed in the solution of the problem before you.

Now, let us see what is meant by the meaning of this word "willfully" as used in this connection. If it were not for the fact that under certain circumstances, if you find them to exist in this case, whatever condition which shows that the act or acts was or were done willfully you would be authorized to find that they were done with malice aforethought, I would dwell but very briefly upon the definition of this word willfully, because I conceive that you can have no difficulty in understanding its meaning,
especially when the weapons used in producing the deadly
43 result are those of a deadly character, made for the purpose of tak-
ing life, and known to be of that character by the one or ones who used them. But it is necessary that you should accurately understand the meaning of this word, because it is one of the constituent elements of the crime of murder, and because that very definition may show to your satisfaction, beyond a reasonable doubt, that the other element exists in the case known as malice aforethought. The word "willful," says the law, as used in connection with the charge of murder, such as that which is preferred in this indictment against this defendant, means an intentional killing, and not an accidental killing. It means the doing of an act which results in death that is intentionally done, and one that is not accidentally done. There is a contrast between the meaning of these two expressions. When you get the meaning of one, for example, when you get that which is an accident, you can the more readily grasp the meaning of the other, because one is in direct contrast with the other. The law says there is a great difference between that which is accidental and that which is intentional. The law fastens intent to every act that is not an accident. Every act that produces death that is outside of the definition of the word "accident" is intentional in the law, whether it grows out of a specific design to take life, or whether it grows out of gross carelessness, or whether it arises from a condition of mind that prompts the possessor of that mind to be engaged in some other wrongful or criminal act, and in
the execution of such wrongful or criminal act a life is taken,
44 provided it is a wrongful or criminal act which from its nature, and
the way it is executed, as a natural, probable, and reasonable result death may ensue from the execution of the unlawful or criminal act. That which is an accident in the law is something which occurs after the exercise of the care that the law requires to be exercised to prevent its occurrence. That care is always in proportion to the surrounding facts and circumstances. If the agency which is being used or handled is dangerous, if it is very dangerous, if it is of the most dangerous character, then the highest degree of care is required to prevent deadly results. If

that care is exercised, and a deadly result ensues notwithstanding, that is called an accident; it is a misadventure. If that care is not exercised, because there is a specific purpose to use the weapon in a deadly way, or because there is a state of general malevolence, as the law denominates it, which shows a recklessness of consequences, recklessness of the fact as to whether human life is destroyed or not, when it is used in that way it is used in a way that is directly the opposite of that which is known as an accident in the law, which is known as an intentional use, and that fact may be found by the character of the weapon used, and the manner of its use. For example, a man presents a gun at another, and fires it at him; the fact of drawing the gun, and presenting it, shows that he wills what he does, shows that that act is willful upon his part. That is why I said awhile ago that it was easy, to my mind, for you to understand what is meant by "willfully" as used in this connection, because you know what a gun is; your common observation teaches you that; when you see a
45 man present it at another within shooting distance of him, and shoot it at him, you take the fact of the presentation and shooting, you take the very fact of the part of the body in which the deadly missile entered, because there are some parts of the body that are recognized by everybody to be more vital than others. If a man is shot through the heart, or through the head, or neck, or through the trunk, it shows a clearer purpose to produce a deadly result than if he was shot in the finger—yet that would show it—or if he was shot in any of the extremeties, such as the toe. So you may take the location of the wound, the character of the weapon, and when you see it used in that way your common observation is brought to bear upon that fact as you bring it to bear in the jury box upon every fact that is presented to you; and I say to you, as the law says, that when that state of case exists, the act of presenting and firing a gun, that is recognized by common observation and common experience as a willful act.

Everyone knows that a gun is an inanimate thing. It has no will power of itself. Therefore, common observation produces the conclusion that when a man presents it at another, and fires it, and death ensues as a consequence, that from the act of drawing, presenting, and firing the gun the party intended there sult; and that is exactly the conclusion you would come to if you would see an occurrence of that kind happen in that way, and it is exactly the conclusion that you are authorized as reasonable men to come to in the jury box if you have a case illustrated or illuminated by such facts as those and when such evidence is presented before you. You have the right, simply, to come to the same rational conclusion that you would come to as
46 reasonable men if you would see a transaction of that kind with your own eyes. You have not seen this transaction occur with your own eyes, but you have applied one of the other senses, as I have already told you, to it; you have applied the sense of hearing to it. The facts have been reproduced before you, and you have heard them. It is for you to take these facts and apply your hearing to them, and your recollection, and your judgment, and to see what the nature of the occurrence was when you have these facts before you, and you have the right to come to the same conclusion as you would as though you had witnessed the occurrence yourself. I have now told you how you may find that the act was done willfully. If an act of that character produces death, because the'e is a known connection between the act and the result which is probable, which is usual, and which is reasonable, the party is said to have

intended the result, and as intentional means willful, he is said to have willed the result. Now, in connection with that, we are to look as to how we may find it. I have already substantially told you how you may find it. The law says it is something that can only be found by inference. It can only be found by the circumstances in the case, from the nature of the act done, and the way it was done, the character of the weapon used, bearing in mind that the law holds every man to know the nature of the weapon that he uses, the purposes for which it is constructed, and the results that naturally and reasonably are produced by it. That is recognized by the law as a matter of common knowledge, within the mind of every man who has arrived at the years of discretion. For that reason, when a man presents a gun or pistol at anothe', and shoots at him, the law says he
47 intends to kill him, because the killing is a result that is natural, probable, and reasonable, and it, therefore, says he willfully kills him when he does an act of that kind. When you find that the act was done willfully, you find that the result was produced willfully, upon this principle of the law that I have already given you, which announces to you that every man is held to have intended the natural or probable consequences of what he does. That rule is necessary for the safety of human life, for the preservation of that high right that belongs to innocent men in this country—the right to life, and the right to the fullest protection that can be afforded to them by the law of the land in the hands of those whose sworn duty it is to administer that law.

A word further, now, as to how you may find this element of the crime of murder. The presumption that the law recognizes is that a man is held to have intended the natural and ordinary consequences of his act. Every sane man, who is a voluntary agent, acting upon motive, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from that act is that he intended so to destroy such person's life. Shooting at a man is the doing of an act which has a direct tendency, ordinarily, to destroy his life, and the natural conclusion from the act of shooting is that he intended to destroy such person's life. So, if the direct tendency of the willful act is to do another some bodily harm, and death in fact follows as a probable conse-
48 quence of the act, it is presumed that he intended such consequences, and he must stand legally responsible for it. Where a dangerous and deadly weapon is used with violence on the person of another, as this has a tendency to destroy life or to do some great bodily harm to the person assailed, the intention to take life or to do him some great bodily harm is a necessary conclusion from the act. Then, I say to you, in finding this element of the crime you do just as you do when you are hunting for malice aforethought, as I will tell you presently. You take the character of the killing, the character of the weapon used, the manner of its use, the very act that is produced, the very repetition of it, and then what was done by the party or parties after such killing in the way of evincing or showing whether the act was done willfully or whether it was done by accident; that is, I mean whether the evidence shows that the parties or either one of them was robbed of property or money after being killed; if so, that becomes a potential fact in the case to show that there was a willful purpose upon the part of those who may have done the killing.

Now, I want you to bear in mind one fact in this case, because I want to admonish you as to that, because this court has to be very particular and very guarded in what it says to juries, not because of the fact that the jury may be mislead, but there are reasons existing why it is so, and it is not necessary for me to name them here. I ask you to bear this in mind: That although the court has the right under the rules of practice to comment upon the facts and to give you its opinion of their proving
49 power, I admonish you that the ultimate duty rests upon you of weighing each and all of these facts and saying what they prove. Notwithstanding the court may express its opinion upon them, it is your ultimate duty, and it is your ultimate right, and one you cannot escape, of weighing these facts and saying what in your judgment they establish, what propositions are established by them.

I have now told you what constitutes the first element of the crime of murder in addition to the fact of killing, the fact that they are dead, and that they died of violence of the kind named in the indictment. The next element, and the characteristic element of that character of killing that is denominated as murder, is that it was done with malice aforethought. And it becomes my duty to define that to you, to tell you what the law says that is, because you are governed by the law and the evidence in the case.

Malice aforethought is defined, says the law, in a general way to be the doing of a wrongful act, without just cause or excuse, and in such a way and under such circumstances as to show that it was done willfully, and that it was done in the absence of that which would give the party the right to defend against it, or that it was done in the absence of mitigating circumstances.

Now, if there be no mitigating circumstances in this case so as to reduce the grade of this crime, in your judgment, under the law that I give you, or if there be no case of self-defence in it, then you would have the doing of a wrongful act without just cause or excuse, in such a way and under such circumstances as to show that it was done in the absence of
50 mitigating circumstances, or in the absence of facts which would give the defendant, or the party with whom he was acting, if he was acting with another party, the right to defend against it.

Again, the law says it is defined as the doing of a wrongful act without just cause or excuse in such a way as to show that he who did it had a heart void of social duty and a mind fatally bent upon mischief.

Now, let us see, in this connection, how the law tells us we may find its existence. It can only be found by circumstances, like the element of willfulness, because malice aforethought, like that element, is something which exists in the mind, and whenever there is a thing which exists in the mind that is necessary to be found to make up the elements of the case, for the reason that you can not get into that mind and know what is going on there, and for the additional reason you could not tell what was transpiring th're if you could get into it, you must necessarily learn these propositions in some other way. There must be some rational way by which you can learn it—some way that you, as rational, men would adopt, because you are not authorized to adopt any other method than that which is reasonable in arriving at conclusions. There is a reasonable way, which is the way that the law recognizes as the proper way by which men arrive

at conclusions. It is from the nature of the transaction, the nature of what takes place, the character of the thing done, all the surrounding facts and circumstances that you are authorized to take into consideration to see what the nature of the thing done was, whether it was an innocent
51 or criminal act, and if it was a criminal act, what was the character of that criminal act. You do exactly like you do in the ordinary affairs of life in passing upon a proposition of importance. You gather up all the surrounding facts connected with the asserted proposition, and you use them to enable you to characterise that proposition. You see what the nature of it was. In a proposition of this kind when you are called upon to find the existence of its truth or falsity—that is, whether the killing of Poorboy and of Whitehead were acts that had malice aforethought connected with them—you are to see whether that killing was done in such a way as to show that its authors had hearts void of social duty and minds fatally bent upon mischief. You can only see that by looking at the method adopted by them to take away the lives of the men alleged to have been killed. If that method was in accordance with the rules of humanity, exercised by men acting consciously under the law of self-defense, then it goes to characterise the acts as acts of that character. If these facts and circumstances were of a nature to show the doing of acts that can be mitigated under the law, then it goes to show the existence of an offense of less grade than is the crime known as the deep, dark, and damning crime of murder, because it has in it the existence of that which would go to mitigate it. If it was not committed in either one of these ways, but was committed in the third way, it is the crime of murder, because it has in it these very elements which shows that it was perpetrated; that it was committed by its author or authors in such a way as to show the existence of hearts void of social duty and minds fatally bent
52 upon mischief. You take the surroundings, the very method of the killing, the very repetition of the shots, the very position of the parties when the shots were fired, and the circumstances that transpired afterwards upon the part of those charged with being the authors of the death of these parties alleged to have been killed by them.

The law again says that malice aforethought is the grand criterion which distinguishes murder from other homicides. It is not so properly spite or malevolence to the deceased in particular, as any evil design in general. The dictate of a wicked, depraved, and malignant heart, the purpose to do a wicked act, and it may be either express or implied in the law. Express malice is when one with a sedate and deliberate mind and formed design doth kill another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces, or former grudges and concerted schemes to do some bodily harm. If these parties were killed for the purpose of robbery, the very fact of the robbery shows a state of general malevolence, a general wickedness of purpose, and a general design to do wrong that is of a double criminal character in showing the existence of this element of the crime of murder.

It means again, the law says, an intention to do bodily harm—such bodily harm as may result in death, without just cause or excuse, and in the absence of mitigating facts; a formed design to do mischief. It has also been defined as a deliberate purpose to kill, as evidenced by the man-

ner of the killing, and by what transpired after the killing. A man forms a deliberate intent to kill another. That is a malicious
53 killing. Now, it may not import especial malevolence towards the party slain, for it also includes the case of a generally depraved, wicked, and malicious spirit, or, as I have told you, a heart regardless of social duty and a mind deliberately bent on mischief. It imports premeditation; that is, thought of beforehand. Therefore, there must logically be a period of prior consideration, but as to the duration of that period no limit can be arbitrarily assigned. The time will vary as do the minds and temperaments of men, and as do the circumstances in which they are placed. The human mind acts at times with marvelous rapidity. Men have sometimes seen the events of a lifetime pass in a few moments before their mental vision. Thought is sometimes referred to as the very symbol of swiftness. There is no time so short but that within it the human mind can form a deliberate purpose to kill, to do an act which may result in death; and, if the intention to do mischief to another is thus formed as a deliberate intent, though after no matter how short a period of reflection, it none the less is malice.

Now, in this age, with the wonderful destructive weapons, weapons that can be used in the twinkling of an eye, a man may conceive a purpose to execute a deadly design, and he may execute it so quickly thereafter as that we could scarcely perceive the time existing between the conception of the thought and its execution. Practically speaking, it is cotemperaneous with the execution of it. A man has a purpose which causes him to do a deadly act. You can not see that purpose or know anything about it as long as it is in the mind alone, but we have to wait until it ripens into an act; but when you see that he intentionally draws a gun, presents
54 it at the head of another, and fired it through his brain, you have then a ripening of that intent into an act that executes a deadly purpose, and you would have a right to say from the drawing, as in the case where you should find that it was done willfully, you have a right to say from the drawing and presentation and firing of that weapon in that way that the party thought of that act beforehand, that he premeditated that deadly purpose. Why? Because, as in the other case, the gun can not present itself; it can not pull its own trigger; it can not elevate itself at a vital part of the body of a man and shoot its deadly missile through the brain. There must be some intelligent agency that directs that deadly weapon, and the use of that intelligent agency implies that its use was thought of beforehand, and therefore that it was premedi'ated if it was not done with just cause or excuse or in the absence of mitigating facts. The proof of the very fact showing the drawing and presentation of a gun in that way shows the doing of an act exhibiting a heart void of social duty and a mind fatally bent on mischief, and would consequently show the doing of an act that is known to the law as one that had involved in it malice aforethought. But you are not to stop with the firing of the gun. You are to see whether that firing was repeated, and what the position of the man or men killed was when they were fired at after that; whether they were in the act of begging for mercy, or whether they were in an attitude where they could slay this defendant and Wakoo Hamption. If one of them had already been shot, and was down or partly down and begging for mercy, and was fired upon again you have a right to take that

fact into consideration in passing upon the question as to whether
55 there is malice aforethought existing here, and as to the other man, if he was shot through the brain, and was laying prostrate, was laying powerless upon the earth, you are to see whether the evidence shows that he was fired upon again, because these acts are competent and proper acts to be taken into account by you to enable you to characterize the action that resulted in the death of these men; to see whether these acts as done in that way exhibited hearts void of social duty and minds fatally bent upon mischief, or the doing of a wrongful act or wrongful acts without just cause or excuse, which resulted in death to the men alleged to have been killed.

Then you go further than that in hunting for this element of this crime, because the proposition that you are passing upon is twofold. You are not only to see whether crime exists, but the duty is equally solemn, and imperative upon you to show exactly and correctly under the law what is the character of that crime. You do not sit here to enter into combinations and agreements with crime. You sit here to proclaim first the fact that crime exists, if it does exist, and then to proclaim with equal certainty what the character of that crime is. That is your duty, and to go outside of it, and act in any other way, is substantially a compromise with crime and with wrong. Then you are to take all these facts and all these circumstances that have been admitted to you to enable you to see what was the character of this killing. That is upon the principle that there is a wide line marking the distinction between acts that are innocently done, acts done in self-defense, and acts that are done with malice
56 aforethought, which result in death. As a usual rule there is great difference between the conduct of men who kill under a consciousness that they are doing nothing but exercising the right of self-defense, and those who kill in such a way as that even their consciences teach them the character of the act. I remind you of this. It is a matter of common observation that you have a right to use. You have a right to use it to enable your minds to come to an intelligent conclusion in this case. If the conduct of the defendant, either while acting alone, or in conjunction with Wakoo Hamption, was of the kind that usually characterizes the actions of men who kill in self-defense, or who kill when a state of manslaughter only exists, then that conduct goes in his favor; but, if that conduct was the other way, if it was outside of that line, if it is conduct that usually characterizes the actions of men who kill, and when they do so they do so wrongfully, without just cause or excuse, or in the absence of mitigating facts which results in death, then these facts go against him, and you have a right to take them into account, and in passing upon them it is your duty to ask the question whether the conduct as described by the witnesses, if you believe it occurred, such as robbing the ones killed, the repeated shots, and the robbery afterwards, is the conduct of men who kill when a state of self-defense existed and they acted under that condition at the time of the killing, because malice is an intent of the mind and heart, like willfully, and you never have presented to you direct evidence of its existence. You can not tell whether it exists or not by direct or positive proof. You can not apply directly to this thing which
57 goes to characterize murder any one of the five means we have of learning truth, or learning facts, but I will tell you what you can do: You can apply these elements that are given to us to obtain

knowledge to facts proven, and from finding their cause we may reason to the conclusion that we are seeking to arrive at to enable us to say whether the state of case that is found to exist is one that has malice aforethought connected with it or not.

The laws says there is never presented to a jury direct evidence of what was the intent of a man's heart at the time. He is the only possible and direct witness to that, and if he meant so to testify he would plead guilty. The existence or non-existence of malice is an inference to be drawn by the jury from all the facts in the case. The emotions of the heart and the processes of the mind are to us, or to any one outside of the individual, exhibited by the acts which the individual performs, and you are entitled to infer what his intent was, what were the processes of his mind, and the feelings of his heart, by a careful study of the acts which he performs, and all the other external indications which he may have given of what his state of mind and heart was at the time of the killing. As an eminent text writer has put it, there is no case of malicious himicide in which malice is not inferred from attendant circumstances; no case in which it is demonstrated as express. It can not be demonstrated by positive testimony. Anything that shows deliberation, anything that shows premeditation, anything that shows a premeditated purpose to do a wicked or willful act that may result in death, is evidence, says the law, that may be considered by you, going to show the existence of malice aforethought. The law lays it down as a principle that if premeditation is shown, if the purpose to kill directly existed in the mind of the party or parties who killed, or the purpose to do a willful act that might result in death, is shown by the action of the party or parties to have had a previous existence, that shows the existence of malice aforethought. And when that state of case is proven beyond a reasonable doubt, there is necessarily absent from the case that state of facts which goes to show that the party or parties had a right to do what he or they did do, because one is directly the opposite of the other, and the proof of the existence of one eleminates the existence of the other from the case. That is a very proper way of reasoning.

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Now there are three conditions, and only three, that can grow out of the taking of human life under the law of the United States. If we find that one exists, we necessarily find that the other two do not exist, because they are opposed to the one that we may find to exist, and when you have all three placed before you you are the better able, by contrast or comparison, to see what is the state of case existing, and we are the better enabled to appropriately and properly denominate it, or designate it, under the law. The law lays it down that the deliberate selection and use of a deadly weapon shows premeditation. Now if that weapon is not used in a state of case where the party has a right to use it, the premeditated use of it in such a state of case as that shows the existence of malice aforethought, or the doing of a wrongful act without just cause or excuse, in the absence of mitigating facts.

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[You then go to the killing, and you ascertain how it was produced, the way it transpired; you see the character of the weapon used, how often it was used, whether it was deliberately and willfully used at the time, and in such a state of case where the evidence shows that the killing was willfully done, as I have already told you, if there is an

absence from the case of that which shows that the party had a right to so willfully kill, under the law of se f-defense, or that the killing was willful, but there were mitigating facts attending it, the proof which shows that it was willfully done, shows that it was done with malice aforethought, and in a case of that kind the very same degree of proof that shows a willful killing would show a killing with malice aforethought.] To the giving of part enclosed defendant at the time excepted.

I have now given you the definition of these expressions that enter into this crime of murder which are necessary to be found, and I have undertaken to tell you the means that you may adopt to find their existence. If you find in this case that these two men were shot to death with guns, and there was nothing under the law that I am going to give you that would justify that killing, or mitigate the crime, the fact that they were so shot to death willfully means that there was a deliberate selection and use of a deadly weapon, of guns or pistols, and that they were used in a state of case where they could not be rightfully used under the law. From these circumstances, and from the other attending circumstances there existing at the time of the killing, or that you may find occurred immediately after the killing, such as the taking of the property or money, you have a right to take into account, and it would be your duty, if you find the
60 absence of either of these conditions that I have named to you, known as self-defense and manslaughter, in the face of evidences of this kind; that is, the killing as done in that way, the subsequent robbery of the parties killed, it would be your duty to take into account all of these facts to show deliberation, to show premeditation, to show the doing of an act either growing out of special spite or grudge or ill will against those particular persons killed, or an act germinated by that general malevolence and that general wickedness that makes men reckless of human life, and regardless of the fact of whether others live or die.

Now, it is charged by the Government, not in so many words in the indictment, but in the presentation of its case to you, that the defendant did not alone participate in this act which resulted in the death of these two men; that there was another, or others, besides the defendant. It therefore becomes necessary in this connection for us to look at the law to see how a man may be a participant in an act either by himself, or jointly with another, or others, becoming so connected with it as to be responsible if a crime has been committed. You will understand, in this connection, that a man may either alone commit an act that is a crime, or he may be responsible because another actually does the act, and that he is so related to that act as to be responsible legally for what the other does. For instance, in this case, if this defendant was connected with the shooting of the person who is alleged to have been killed by Wakoo Hampton, in such a way under the principles of the law that I am about to give you as to put him in a certain position with reference to the act, he would
61 be responsible for that act just the same as though he had done it with his own hand; and it would not matter whether Wakoo Hampton fired the gun or he fired it. If Wakoo Hampton fired it, and the defendant was connected with the firing of it in a way that would make him responsible under this law that I will give you, and this defendant would be responsible for whatever crime would grow out of that killing as though he had done it alone. When there is concert of action in

the production of a deadly result, you are to look at that fact to see whether that may not become a characterising fact going to show premeditation, going to show that it was thought of beforehand. The very fact that men concert to do a criminal act, the very fact that they do so concert, that they act together in the doing of it, becomes a fact that may be taken into account to enable you to characterise that act. You are to see, in this case, whether or not this defendant was a participant in that killing in such a way as to make him responsible for that act. The law tells us who are actual participants in a crime, and who may be legal participants in such a way as to be responsible for it. It says that all those who knowingly and intelligently strike in such a way as to produce a criminal result, if that result is death, all those who strike in such a way as to produce that result are participants in that act, and it is their act, and they are regarded as being present and actual perpetrators of the crime, whatever it may be, if they do so participate in it as to produce the result, or do an act which has a tendency to produce the result. If it is a case where life has been taken, as in this case, where two lives are charged to have been taken, and such acts done, the act is the act of those who have so
62 joined in the unlawful undertaking. They are regarded as persons who are present at the place of the crime, and as unlawful participants in it.

The law says that if a man, although he may not with his own hand do that which results in death to a party, if he is at the place where the death is produced for the purpose of participating in the criminal result if it should become necessary, although he does not participate in it because it is accomplished without his aid of that kind, it is his act if he is at that place; it is a state of case where he is regarded as present aiding and abetting and assisting in the commission of the crime if he is at that place for the purpose of so aiding, abetting and assisting. The law says that he may render assistance which contributes to the result if his presence exercises such influence upon the mind of any of the others who with his or their hands commit the crime, if they are induced the more readily to do it than they would otherwise be induced to do it. In other words, if they are induced more readily to do it than if he was absent. If the presence of the party, with the consciousness of the fact that a party having the same desire, having a common criminal mind as the one who takes the life is present, and that exerts such an influence upon him who does the act as that he strikes the more quickly than he would if he was not present, the law says that is a state of case where he is actually aiding in the production of the criminal result. If he is present at the place, and he is there aiding, or in any way assisting, advising, counselling or abetting the act, it is his act, and it is the act of all who are so
63 connected with it. If he is present at the place for the purpose of assisting, abetting, counselling, aiding or advising in the commission of the act, though he does not do so, it is done without any assistance rendered by him, the law says he is a participant in it just as much as though he had done it with his own hand. And in this connection you are to look to the evidence to see whether or not at the time of the killing of the man shot by Hampton, whether there was any words of encouragement towards the execution of that act offered by this defendant to Hampton, who was doing the shooting, if you believe he did it; see

what that encouragement was, what was said by him, and if it was of the character that would have a tendency naturally and probably to assist, or to aid, or to abet, or counsel, or advise Hampton in the doing of that act of shooting, that the defendant was there present joined in the same common criminal undertaking, or same common criminal enterprise with Hampton, then the killing of the man who may have been killed by Hampton would be a killing by this defendant, in the law, as well as by Hampton. That is what is meant by being present, aiding, and abetting, and assisting, or counselling, or advising. It is to be taken into account for that purpose, to show whether that act was his and Hampton's, and it is to be taken into account for the purpose of enabling you to see whether the act was done in such a way by him, or as done by Hampton in conjunction with him, which showed that they were possessed of hearts void of social duty, and minds fatally bent upon mischief. If so, that fact serves the double purpose; it serves the purpose of connecting the defendant with the crime
64 and it serves the purpose of showing the character of the act done by them.

The law says again, if a party is actually aiding, assisting or abetting, though he may not be really present actually at the place of the crime, he is a participant in it just as much as though he was there, was actually at the place, and he was doing everything that was necessary to be done to produce the criminal result. This is known as the doctrine of constructive presence, or legal presence, and that means so near to the place of the crime as to be in someway able to assist, advise, counsel, or abet, and if he is so present for the purpose of aiding, or for the purpose of abetting or assisting in its commission, though as a matter of fact he does not do it, because it is not necessary, as in the case of real presence, when he is there for the purpose of acting if called upon to act, the law says that he is so related to the criminal act as that it is his as well as the act of all of those who may have participated in it. All persons who are present at the time of the commission of a crime are principals, says the law, though only one committed the act, provided all are proven to have confederated and engaged in a common design, of which the perpetration of the crime is a part. This doctrine of criminal combination is firmly established in our criminal jurisprudence, and the cases furnish numerous illustrations. All are held responsible, because the will of each individual contributed to it; each intended that the crime should be perpetrated.

"What, in the sense of the law, is meant by being present, aiding,
65 and abetting, is thus stated in Foster's Crown Law, that 'When the law requires the presence of the accomplice at the perpetration of the fact in order to render him a principal, it does not require a strict, actual, immediate presence, such a presence as would make him an eye or ear witness of what passeth. Several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned to him; some to commit the fact, others to watch at proper distances and stations to prevent a surprise or to favor, if need be, the escape of those who are more immediately engaged. They are all—provided the fact be committed—in the eye of the law, present at it, for it was made a common cause with them, each man operating in his station at one and the same instant towards the

common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to secure the success of their common enterprise.'"

If the confederates, at the time of the commission of the crime, were assenting to the murder, and in a situation where they might render some aid to the perpetrator, ready to give it, ready, if necessary, to aid in the commission of the crime, they are all, in the judgment of the law, present, aiding in the commission of the crime, though they may not, as a matter of fact, do anything except to take themselves to that place for the purpose of assisting should they be called upon to render assistance.

"In Hess v. State, 5 Ohio, 12, the rule is thus stated: 'If several unite in one common design to do some unlawful act, and each takes the part assigned him, though all are not actually present, yet all are present in the eye of the law.'"

66 Again: "At common law all who were present encouraging, aiding, and abetting, or stood ready to afford assistance, if necessary, were considered principals, either in the first or second degree." (Russ on Crimes, 25–27.)

Again: "A crime may consist of many acts which must all be committed in order to complete the offense; but each person present consenting to the commission of the offense and doing any act which is either an ingredient in the crime or immediately connected with or leading to its commission, is as much a principal as if he had with his own hand committed the whole offense. You could not respect the laws of your country if they punished with less severity or made any discrimination between the man who bound and held the victim and the one who gave the fatal blow—the robber who held the pistol to your breast or the one who rifles your pockets. Both are murders, both are robbers in the eye of the law of reason and justice. No principle can be better settled or ought to be maintained with more care than this. It would be in vain to pass laws for the prevention or punishment of crimes if courts and juries were bound so to administer them as to require definite proof that a party accused committed every act necessary to bring them within the law, though it was manifest that it was the joint act of himself and associates, who took an active part in the actual perpetration; there is no such rule in our jurisprudence." United States v. Wilson, Baldw. (U. S.), 103, 104.

67 Now, the fact that men act jointly in the taking of human life implies the existence of an agreement to do that. That is called a conspiracy. We know that conspiracy does not have to exist for a day or a month. In this case it may have been formed at Annie Hitchcock's, or may not have been formed there. It may not have been entered upon, or it may have been entered upon there, to kill somebody else, or not to do so, because it is not necessary that it should have been, for if the parties were up there at the place of the killing, and one of them commenced firing wrongfully and illegally upon the men killed, and the defendant was there and assisted in the taking of the lives of these two men, that would be entering into a conspiracy, though no formal words may have been uttered between them to indicate a purpose to enter into it, or that they did enter into it. A man may enter into an unlawful undertaking of that kind tacitly. If he knows the condition, and with that knowledge in his mind he goes into it, and enters upon it, and

assists the other in the commission of a crime, that is entering into a conspiracy, and that is the execution of it, if the parties are killed in consequence of it. It often happens that purpose to kill may be formed upon the spur of the moment, and that others may join in that purpose when they see it disclosed by the action of the one who first forms the purpose. If that is so, that is joining in an unlawful enterprise. That is the definition of conspiracy. It is well to note these rules. It is well to note the facts in this case to see whether that condition existed as affecting this defendant, because if he was there, and joined in the purpose of that unlawful undertaking, or in any way that I have indicated to you assisted Hampton in killing the man he killed, then the killing of that man would be the act of this defendant.

68 Furthermore, in this connection I call your attention to the proposition of the law, that whenever an unlawful undertaking of that kind is entered upon, whatever is done by one in furtherance of it during the time of its execution is done by all who are engaged in it, who are connected with it; the act of each is the act of all who are so connected with it as to make them parties to the unlawful undertaking. The words of one uttered in pursuance of it, in furtherance of it, in encouragement of it, to stimulate others to shoot again, and again, are the words of all who may have been connected in the criminal enterprise. Therefore it is necessary that you should understand what the relation of the defendant was to that act.

Now, there is another crime, as I have already told you, which is called the crime of manslaughter, and I am going to give you the definition of that. I give it to you for two reasons: If it exists in the case, under the law, and under the evidence, it is your duty to say that it exists. If you find it does not exist, it the better enables you to see what the crime is, if crimes does exist, because if it does not exist, and crime exists in the case, then the only remaining state of case that you can find as existing would be the crime of murder, because there is only two crimes—murder and manslaughter—growing out of the taking of human life.

[Manslaughter, says the law, is the unlawful killing of a human being, without malice aforethought. It occupies a midway position between the state of case where the law of self-defense would apply, and the

69 state of case when the law defining murder would apply. It is a state of case that exists because of the wrongful act of the party, or parties, killed, at the time of the killing, because of a wrongful act that is provocative in its character, and not so provocative as to excuse the crime, but so much so as to reduce the grade of it. The law recognizes the fact that it usually occurs when it grows out of a state of violence, when a killing occurs because of violence. When two men, for example, are engaged in an affray, in a fight, in an ordinary fisticuff, or fist-and-skull fight, as it were, and they enter into it, and they are engaged in it without any purpose to take life, and one may get the advantage of the other. He may rain blows on his person that cause pain, and that cause the mind to be inflamed and excited, and if a party while in that condition, without any previous preparation to take life, kills, that is manslaughter. But if there is any previous preparation, if he has prepared himself with a deadly weapon, and uses it for that purpose there, that shows deliberation, that shows premeditation, that shows a deliberate selection and use

of a deadly weapon, and, under the law that I have read to you, that is one of the most powerful methods of ascertaining the existence of malice aforethought. But, without any preparation of that kind, without any previous purpose to take life, he suddenly, upon the spur of the moment, while that affray exists, takes life, that is manslaughter, because of the wrongful act of the party who is killed putting his mind in a condition where the law contemplates that it acts from passion, and not from a spirit of premeditation or deliberation.] To the giving of that part above enclosed, defendant at the time excepted.

[Now, in this case it becomes necessary to give you the law
70 bearing upon the question of the rights of Whitehead and Poorboy. The record has been offered before you of a judgment of this court showing the conviction of Wakoo Hampton for the crime of manslaughter upon the charge of murder. The proof has been offered before you showing his escape from the place of confinement, the reform school, he being sent there because he was under the age to send to the penitentiary. The proof shows his escape from that place, and that he was back in the Indian country. That put him in the position of an escaped convict, of a man who had been convicted of a high crime and who had escaped from his prison. Under the law any citizen had the right to arrest him, any citizen had the right to capture him, and they not only had the right to do that, but it was their duty to do it. It was not necessary that any warrants should have been issued to give any citizen the right to effect his capture. They had a right to effect his capture by all reasonable means that could be employed to accomplish that result, taking into account and into consideration that the citizen who entered upon that purpose had the right to stand upon the defensive to protect himself while he was lawfully seeking to execute that purpose.] To the giving of that part above enclosed defendant at the time excepted.

[Now, again, the record has been offered before you in evidence showing the conviction of Jim Craig of the crime of adultery, for which he was tried and convicted in this court. The proof shows that he stood charged with that crime at that time. Any citizen had the right to effect his arrest. It would be necessary for the citizen in such a state of case as that to show the existence of that crime if called upon to do it afterwards,
71 and that there was probable cause to believe that he was guilty of it. You have the right to take into consideration the judgment of this court as evidence of that crime and as evidence of his guilt of it. That being the state of case, these two citizens, Whitehead and Poorboy, had a right to effect his arrest, and they had a right to use all reasonable means on that night, on that to them fatal night, to ascertain whether these parties who were in the road there were either Wakoo Hampton or Jim Craig, and if while they were using means of that character, after ascertaining who they were, Hampton and this defendant, while acting in concert with him, or Roach, if you please, too, put themselves in such an attitude as that it was an attitude of danger to these men while they were endeavoring to ascertain who these parties were, then these men, Whitehead and Poorboy, had a right to put themselves in a defensive attitude and to protect themselves while they were making a reasonable effort to ascertain if these parties were either one of the parties that they had a right to arrest. They had that right as citizens if these conditions existed

that I have indicated to you. They had a right, and it was not only their right, but their duty, if they had reasons to believe that the men in that party might be the men that they were seeking, to use all the reasonable means to ascertain that fact, and if while they were using these means they were fired upon by this party, by this defendant, or by Wakoo Hampton, and he acting in concert with him, or whether these men put themselves in such attitude by the use of their weapons as to indicate a deadly purpose,
72 then the men who were seeking to make the necessary effort, if it was an effort of that kind, had a right to stand upon the defensive, and were only standing upon the defensive when they were making that effort; and while so situated, seeking to make that arrest, they had the right to subject other citizens to even temporary detention that they might be enabled to ascertain whether such other citizens were the ones they were seeking to arrest. You are to look at the law in this particular to see what was the attitude of these parties first, and then to see whether they were acting as they had a right to act.] To the giving of the part above enclosed defendant at the time excepted.

The law of self-defense has been invoked in this case. It is claimed by the defendant, through his counsel in the case, that the killing of these men was right, under the law. I say right, because to be right it must have been a defensive act, and such a defensive act as the law permits, and such a defensive act as the law says the citizen has a right to if the case exists that warrants him in exercising it. If that be the state of case, you are to say that the act is justifiable. But you can not yet say that, of course, because you do not know, as yet, what the law of self-defense is. You have a general idea, and perhaps a correct one, but the law makes it my duty to give to you the law of self-defense, to tell you what it is, that you may make a correct application of it, or that you may say whether or not it is applicable. The law of self-defense contemplates a state of case where the killing is done properly, where it is done legally, where it is done rightfully. It is the direct opposite of the case where murder has been committed, because that is a killing that is unlawful, that is willful,
73 and that has malice aforethought connected with it. It means, then, a state of case where, at the time of the killing, there was to the party who does the killing, or to others he had a right to defend, existing danger to his life that he could not turn aside except by taking the life of the party or parties from whom the danger came. And, under the first proposition of the law of self-defense, it means that there was a state of real, actual danger, danger of such violence, of such a threatening character, that then and there had an existence as affecting the life of the defendant, and that it was necessary for him, in order to save his own life, to kill the one who was the source of that danger. That, in short, is the first proposition of the law of self-defense where there is real danger, and it implies a state of case where the party, before he can invoke it, must have been doing what he had a right to do.

[If he was upon an unlawful mission, if he had entered into an understanding at the time to resist the arrest of Hampton, or to assist in resisting that arrest, or in resisting a case of arrest that could be properly made, he was entering upon the commission of an act where there was a purpose to do an unlawful act, and one in the execution of which a human life might be taken, and under such circumstances he would be in the wrong; he

would be entering upon a state of case that he had no right to enter upon. He must be in the right before he can invoke the law of self-defense. If while Whitehead and Poorboy were making a reasonable search, making reasonable efforts to ascertain whether in that party was either one of these men, the defendant offered resistance, or he assisted Hampton in making the resistance, he was in the wrong, and so far in the wrong up to that
74 time as that he would cut himself off from the right of self-defense, because he could not create by his own wrongful conduct a necessity, and then exercise force that results in death, and then say he can invoke the law of self-defense. The state of case that he can resent to the death must be brought upon him in this case by the wrongful act or acts of Poorboy and Whitehead, without his contributing to them. He must be in the right, under the law]. To the giving of that part above enclosed defendant at the time excepted.

Now, that is the first proposition of the law of self-defense, which I will now give you in the very terms of the law. It says, that "A man, who is in the lawful pursuit of his business"—that is, he is doing what he had a right to do, in the language of the law I have given you—" is attacked by another under circumstances which denote an intention to take away his life, or to do him some enormous bodily harm, may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life, or prevent the intended harm, such as retreating as far as he can, or disabling his adversary, without killing him, if it be in his power." That is the first proposition of the law of self-defense, and it means what I have told you. It means that the party was in the right, and while so situated with reference to the other parties he was attacked by them, under circumstances which denoted a purpose to take away his life, or to do him some enormous bodily harm, and that he might kill—when? Provided he use all the means in his power otherwise to save his life, or prevent the intended harm, such as getting out of the way, or retreating, or submitting so as to save his life, if there was any danger of death impending over him at that time.

75 The other proposition of the law of self-defense is a state of case where the facts and circumstances created by another, or others, not produced by this defendant, in this case, by his wrongful act, would lead a reasonable man, situated as he was, to believe from the nature of these facts and circumstances that there was danger to life, and he acts upon that condition, and kills because of it. It is a state of case where there must be facts, and where there must be circumstances, and where there must be that which would lead a reasonable man, situated as was the defendant, to believe that there was danger to life that could not be avoided except by doing as he did do, by taking life; and like the other, it must be a state of case that can not spring out of the wrongful act of the party who may be seeking to invoke that principle of the law of self-defense, but it is a state of wrong created by the party who he slays that gave him the right to act. That state of case can not be one that is merely imaginary; it can not be one that is a bare conception, but it must spring out of actual facts, actual occurrences, and actual things that exist, and things of the character that would so far mislead that they would mislead or misguide a reasonable man, situated as was the defendant. This, in short, is the second proposition of the law of self-defense.

Now, let us see how it is stated again, under this law. This is the second proposition I will repeat to you. "When, from the nature of the attack, there is a reasonable ground to believe that there is a design to destroy life, or commit any felony upon his person, the killing the assailant will be excusable homicide although it should afterwards appear that no felony was intended." You are the judges of the question as to
76 whether or not the defendant was in the right at the time, under the principles of the law I have given you, or that Wakoo Hampton was in the right, who the defendant was assisting, if he was assisting him; and if when that was the case there was an attack made upon him or upon Hampton of a character that from its nature, and the way it was made, would lead a reasonable man, situated as he was, to believe that it was a deadly attack, one that he had not provoked by his own wrong, one that he had not created by his own conduct, but one that was brought upon him without fault, or without wrong upon his part, or without creation by him, he would have a right to act under it. That is called the law of apparent danger. It is applicable to a condition of circumstances when it exists, as well as the proposition growing out of real danger, but there must be facts that show the existence of a state of case that is applicable to which you can apply either one of these propositions before you can make the application. This law is not a rubber blanket, to be stretched to cover a man's acts because he may want it to cover them. That is not the way it is to be administered. It is to be administered like any other provision of the law—with certainty, with precision—and it is to be applied to a case to which it is applicable, and no other.

Now, it is your duty, as I have told you, to go to the place of this killing. That is a good starting point in this case, and you can travel from that point in pursuit of all the facts and circumstances occurring afterwards that seem to illustrate that occurrence. You may travel back before the killing to see what the facts and circumstances were that led up to
77 it, if there be any, going to show as to how it was brought about. Start, then, at the very time of the killing. If a man kills another in self-defense his act of killing in that way is not an act that is usually characterised by extreme wickedness or great brutality or great depravity or great recklessness of purpose. It is a misfortune to him, and he so regards it, and his conduct is characterised accordingly. Therefore, it is your duty to look at the circumstances of the killing, to see whether it was characterised by facts showing brutality of purpose, showing wickedness of heart, showing great recklessness of human life. These are things that go to characterise that act, that are to be properly taken into consideration by you to show what the character of that act was, and why the killing was done. If men are wicked and reckless their conduct shows moral depravity in the doing of an act which results in death, which will be manifested generally by the way they do that act. Therefore, it is highly important you should know all the facts and circumstances immediately attending the killing. You are to take into consideration all the facts and circumstances that have gone before you throwing any light upon the manner in which the killing was done. Then, afterwards, you are to take into consideration the conduct of these parties. You are to take into consideration their admissions and declarations.

The admissions of a defendant are binding upon him as evidence going to show that part he took in the transaction which resulted in the death of these two men. Admissions of this defendant are competent to go before you, to go to show the manner of the killing, and for the purpose of
78 corroborating the statement of Roach in this case, because you may take the view of it that Roach was an accomplice, was a party to it. If Roach had joined in with these parties to offer resistance against the arrest of Hampton, or to offer resistance against the arrest of Craig, if they had gotten with them, and he continued with them up to the time, with the purpose of aiding and assisting them, and was there for that purpose, that would make him an accomplice in the crime, if their act was a crime, and in such a case as that the law says you may believe what he says, and you may be convinced by that testimony alone of the fact, but it is important that you should look through the case to see whether there are other facts which corroborate him. If these facts come to you in the shape of admissions which show his participation in it, show what he did in the transaction that led to the killing, and what he did afterwards with reference to the money or property, then they become confirmatory facts of the statements of Roach. It is for you to pass upon these things. It is for you to take the admissions voluntarily coming from the defendant as evidence against himself.

The admissions made by Hampton, or the declarations made by him after the killing, which occurred after the crime had been consummated, if crime was committed, would not be binding upon this defendant. They have gone to you as evidence when given in the defendant's presence. If they were uttered in his presence, and he understood them, they may be considered by you for the purpose of showing what his conduct was in the face of these inculpatory statements made by Hampton.
79 That is the figure, and the only figure, that the statements made by Hampton cut, made in the consummation of the crime. That is the distinction between declarations made after the consummation of the crime, and declarations made at its commission, or prior thereto, by one of those who may have jointly entered upon the commission of the crime. As I have already told you, declarations made in pursuance of a crime, such as in the shape of a request to shoot again, made at the time of the killing, and expressions of that kind, are expressions that would be binding upon Hampton, if he was alive here and upon trial, as being uttered in legal contemplation by him. So, that acts done in furtherence of a conspiracy, while the purpose of the conspiracy is still unexecuted, or is simply executory—not yet executed—the agreement, if one existed, to kill, though it may have been entered into at the time, was consummated when the killing took place. Whatever transpired either immediately at that place in connection with the killing, or the robbery, whatever was said by either at that place, or was done by either one, would be binding upon each and all, and they would be bound by it as the word and act of all. But what was said afterwards by Hampton would not be to that extent binding upon this defendant, would not be binding upon him at all; it would not show it was his expression; but it is only offered for the purpose of showing you what his conduct was in the presence of accusatory expressions of Hampton, upon the principle that when such expressions are made men usually combat them if they are innocent, usually deny them if they are

innocent; and if they do not deny them they are to be taken into
80 account in the case as evidence for the purposes I have indicated.
Now, that is the figure that they cut. But, all admissions made by the defendant as to his participation in the crime, or as to his participation in any act that would show he was a participant in it, or that would go to characterize it, are binding upon him as his own admissions. You see I have taken pains to distinguish between these two classes of admissions.

Now, gentlemen, I think I have given you all the principles of the law that are necessary to be given in this case. It remains, then, to call your attention to the rules of the law that are to apply in getting at the truth. You are to take into consideration, first, the nature of the facts coming from the witnesses, what they establish, provided they are true. Then again, you are to see in your judgment whether they are true or not. You are to judge that whether these things that are offered as truths seem to be consistent in themselves. If they are substantial truths they will be consistent, because the truth is always consistent in its material parts, in the parts that are relevant to the proposition that may be under investigation. That is one method of getting at the truthfulness of the statements of witnesses. If, in this case before you, a witness has come before you and asserted one particular fact that is inconsistent with another particular fact, the evidence of that inconsistency may be evidence of its being false; and, on the other hand, its very consistency is evidence of its truth. You are to view its consistency in its own light, and in the light of the other
facts that you find to be true, because, upon the principle that I
81 have given you, if it is true it will harmonize in all its parts. In order to find, again, whether it is true or not, you are to look at it in the light of its probability, in the light of its reasonableness, in your judgment as men of experience, as men of mature years, as men having reasoning powers, as men possessing honest hearts and clear minds, being prompted alone by a desire to get at the truth. If the statement by the light of your observation seems to be probable, natural, and reasonable, that is one method you may adopt in passing upon the question of its truthfulness. It is a proposition, when that exists, in favor of its being true, in favor of its being worthy of belief.

[In passing upon the reasonableness of the testimony and its truthfulness, you are to consider the relation the witnesses bear to the case and to the party on trial. You will bear in mind that people who are brought into court to testify to what they know by process of law are not in an attitude that, from that attitude alone, you have the right to draw an inference against their evidence, because they are performing but a simple duty. It is the duty of every man to obey the process of the law and to give his evidence in court. If they occupy relations that puts them nearer to the case than that, then you may begin to consider that relation. That proposition more especially applies to the defendant in this case than anybody else. He is the party to be most seriously affected by the result of this case; if you find him guilty, and guilty of these two crimes, and these crimes are found
by you to be murder, he is to pay the forefeit with his life. That
82 is the law of the land, enacted for the safety of the people, deemed by the law-makers necessary for their safety, and it is necessay for their safety to be enforced to secure that safety. He is, therefore, in the attitude of one who has the highest possible interest that a man can

have in this life to prompt him to present a state of case to you that you would believe favorable to him, in the light that it would benefit him, that would cause him to escape the penalties of the law; and he but possesses that characteristic of human nature that is possessed to a greater or less extent by all mankind and when they are so situated they are liable to be swayed from the truth even by a consideration of the results that may follow to them from having the jury believe a state of case in opposition to them. You are to take that into consideration when the defendant as a witness goes upon the stand, not that you are to necessarily disbelieve what he may say, because of that relation, but you are to weigh what he says in the light of the evidence. You are to examine it again in the light of the other evidence. If there are facts that are true in the case, that prove anything in the case, that sustain what he says, it will strengthen his evidence. That is to say, it would be supported by such truths, and be stronger than when unsupported and coming from such a witness. Then you view it in the light of the other facts, in the light of the other testimony. And you view it in the light of the circumstances in the case. And in this connection, we invoke the circumstantial testimony as being of the kind that is offered to us, and that at the same time is motiveless.

There is no motive that can induce it to stand upon one side or the
83 other. It is not under the influence of threats, flattery, bribery or fear, but the circumstances of the case standing around the occurrence, the things connected with it at the time of the killing, the things occurring subsequent thereto, are things that were created and brought into existence when their effect could not be foreseen, and they are so created, and have such an existence, that no motive can be used to influence then. They speak before you without fear, without favor, and without affection. Therefore, it is your duty to take them into account, to take them into consideration, to see whether the positive facts, coming especially from the defendant, or from any other witness, are corroborated by these inanimate evidences of the true nature of the occurrence. And then you are to take all the other evidence, whether it be positive or circumstantial in its character, and you are to see whether it contradicts the statements of the defendant as to the character of this occurrence, or whether it corroborates what he says.] To the giving of that part above enclosed defendant at the time excepted.

These two charges in the indictment are to be solved by you by your passing upon them. You are to pass upon both of them. They are separate offenses. They are independent of each other, so far as the law is concerned, although they were committed almost at the same time. They were done by different mechanical acts, they are separate acts with resulted in death, if it be true that these men were killed. If it be true that these men were killed in a murderous way, killed so that their killing is murder, and that one of them was killed by the act of the defendant, directly and immediately producing a deadly injury which produced his death, then that would be his act. If the other one was killed by

Hampton, while he was shooting at him, and this defendant was
84 there participating in that act, was a joint participant in it with Hampton, under the law that I have given you, that would be his act as well as the act of Hampton, and the act of killing would be the act of the defendant as well as the act of Hampton. In other words, if this is the evidence, that would be a state of case where both parties would

be responsible for whatever crime was committed by the taking of the lives of these two men. It becomes necessary, therefore, that you should find separate verdicts upon each of these counts.

I have been asked to give a declaration of law or two by the defendant, which I will give as modified, with the admonition to you that these principles of the law are to be taken together in connection with what I have already stated.

The evidence in this case shows that the deceased, Poorboy and Whitehead, were not officers, but were acting as private citizens, private individuals, without any warrant for Brown, and having no charge against Brown. Therefore, if unintentionally, or by mistake, believing him to be somebody else, they undertook to arrest the defendant, and the defendant resisted such arrest, and in such resistance killed the deceased, or killed the parties attempting such arrest, such killing would not be murder, but would be manslaughter.

That is modified as follows: Unless such killing was done in such a way as to show brutality, barbarity, and a wicked and malignant purpose. If it was done in that way, then it would still be murder.

"If the jury find from the evidence in this case that the deceased, Poorboy and Whitehead, were not officers, and they were acting as
85 private individuals, and were endeavoring or intending to arrest Jim Craig for a reward, and that they demanded the surrender of the defendant, thinking it was Jim Craig, and that they attacked the defendant with guns or pistols, then the defendant had a right to resist such attack, even to the extent of taking the life of the deceased, provided they further find that it was necessary to kill the deceased in order to save his own life, or to save himself from great bodily harm."

But Poorboy and Whitehead had a right to arrest Wakoo Hampton for the offense such as I have named, and to arrest Jim Craig for the offense which I have also already named, and they had a right to make all reasonable efforts to ascertain who Hampton and who the defendant Brown and Roach were, and it was the duty of Hampton, the defendant, and Roach, to give them all reasonable opportunity to ascertain who they were, and if while they were doing that Hampton and the defendant, Brown, offered acts of violence that endangered the lives of Poorboy and Whitehead, Poorboy and Whitehead had a right to do whatever was necessary to defend their lives or persons from great violence arising from the acts done by these parties, or offered by them, or threatened by them in a violent way. The defendant had at the time excepted to the modification of instructions asked by him.

Now, gentlemen, if you are satisfied from the whole of this evidence, viewed dispassionately, coolly, and deliberately by you, as twelve honest and impartial citizens, performing your duty under the law, that the defendant is guilty beyond a reasonable doubt, and guilty of the crime of murder, or the crimes of murder, as charged in these two counts, your duty is to convict him as charged. If you are not satisfied to that extent, your duty would be to acquit him. Now, that does not mean that these propositions which enter into the crime charged are to be
86 demonstrated as you can demonstrate a problem in mathematics. It does not mean that they are to be proven absolutely. It means that they are to be proven to a degree of certainty that there is banished

from such conclusions all doubts for which good reasons can be given. If so, then they are established beyond a reasonable doubt; if so, they are established so that reasonable men would ordinarily believe in their truth. On the other hand, if they are not established to that extent, and are in that condition where there is a real, substantial doubt of guilt, and not a mere conjecture as to the possibility of innocence confronting your minds in the case, your duty would be to act under this condition of reasonable doubt and acquit. But that does not mean it is any kind of doubt that is to govern your minds, for if that was so, you would never come to a conclusion in a jury box, because it may be successfully asserted that no proposition is ever presented to a jury that is free of all doubts; there are conjectural doubts, there are doubts based upon surmises; there are doubts that find an existence in the minds of men who are naturally doubting men, they are not reasonable doubts; they are not reasonable, real, substantial doubts of guilt; they are only conjectural doubts; they are not doubts that can control the minds of reasonable men when they make up conclusions upon the important affairs of life, and that is the kind of conclusions that you are required to make up here, in a matter of as great importance as this.

87 If the proof in this case, in the light of the law I have given you, is sufficient to satisfy you, in your judgment, as reasonable citizens, of the truth of these charges, you would believe them as such citizens, and your duty when such a state of case is proven is to believe them in the jury box, because you have no right to believe as impartial, dispassionate, and deliberate and reasonable citizens, and disbelieve as jurors.

If you find this defendant guilty of these charges you will so specify on the back of this indictment. If you find him guilty of killing the man, as charged in the first count of the indictment, Josiah Poorboy, and that that crime was murder, you will say: We, the jury, find the defendant, John Brown, guilty of murder, as charged in the first count of the indictment, for feloniously, willfully, and with malice aforethought killing Josiah Poorboy, and sign it by one of your number as foreman. - That is the first charge you are required to pass upon. The second charge is for the killing of the other man, Thomas Whitehead. If you find the defendant guilty of the crime of murder as charged in the second count of the indictment, you will say: "We, the jury, find the defendant, John Brown, guilty of murder, as charged in the second count of the indictment, for feloniously, willfully, and with malice aforethought killing Thomas Whitehead," and sign it by one of your number as foreman. If you find him not guilty of murder, but of the crime of manslaughter, you will so specify. If you find him not guilty of any crime, you will so specify.

Gentlemen, the case is submitted to you.

Mr. GRACE (of counsel for defendant). I desire to save some exceptions to the charge.

88 The COURT. Yes; they are all saved—those which you specify; the grounds upon which they are taken.

Mr. GRACE (of counsel for defendant). We have noted several points which we wish to file.

The COURT. Let them be filed.

5.50 p. m.

89 To all of said rulings of the court the defendant at the time excepted.

Whereupon the jury retired to deliberate, and afterwards returned into court the following verdicts:

"We, the jury, find the defendant, John Brown, guilty of murder as charged in the first count of the within indictment, for feloniously, wilfully, and with malice aforethought killing Josiah Poorboy."

(Signed) JAS. T. PHILLIPS, *Foreman.*

"We, the jury, find the defendant, John Brown, guilty of murder as charged in the second count of the within indictment, for feloniously, wilfully, and with malice aforethought killing Thomas Whitehead."

(Signed) JAS. T. PHILLIPS, *Foreman.*

Whereupon the defendant afterwards, on the 31st day of October, 1894, by leave of the court, filed his motion for a new trial, which motion was in the words and figures following, to wit:

United States circuit court, western district of Arkansas.

UNITED STATES }
vs. }
JOHN BROWN. }

Comes defendant, John Brown, and moves the court to set aside the verdict in this case and grant him a new trial, an' for cause of motion assigns the following:

90 1st. Because the court erred in permitting the district attorney to read to the jury the record of the conviction of Jim Craig.

2nd. Because the court erred in permitting evidence to show that Jim Craig was, at time of the killing, charged with the crime of adultery.

3rd. Because the court erred in permitting the district attorney to read in evidence to the jury the record of the conviction of Waco Hampton for manslaughter.

4th. Because the verdict is contrary to the evidence.

5th. Because the court erred in charging the jury as to the law of malice on page 24 of the charge.

6th. Because the court erred in his charge to the jury on the subject of manslaughter—pages 33 & 34 of charge.

7th. Because the court erred in his charge to the jury as to right of deceased to arrest Hampton—pages 34 & 35 of charge.

8th. Because the court erred in his charge to the jury as to the right of deceased to arrest Jim Craig—pages 35, 36, & 37 of charge.

9th. Because the court erred in his charge to the jury in commenting on the defendant as a witness in his own behalf—pages 46, 47, and 48.

10th. Because the court erred in his charge to the jury modifying the instructions as asked by defendant—pages 49 & 50 of charge.

And for other good and sufficient reasons.

JOHN BROWN, *Deft.*
By GEO. A. GRACE,
C. J. FREDERICK,
His Attys.

(Endorsed on back:) Filed Oct. 31, 1894. S. Wheeler, clerk.

Which motion was by the court overruled, and the court in overruling made the following remarks—

91 (Omitted in printing, per stipulation.)

* * * * * * *

108 To all of said rulings of the court the defendant at the time excepted and tenders this, his bill of exceptions, and asks that the same be signed and made a part of the record, which is accordingly done.

I. C. PARKER,
Judge of the Dist. Court, sitting in the Circuit Court.

(Endorsed on back:) Filed Nov. 27, 1894. S. Wheeler, clerk. By I. M. Dodge, D. C.

109 *Assignment of errors.*

United States circuit court, western district of Arkansas. August term, 1894.

UNITED STATES *vs.* JOHN BROWN. } Murder.

The defendant, John Brown, files this, his assignment of errors, committed on the trial of said cause:

1st. It was error for the court to admit in evidence before the jury the record of the conviction of Jim Craig for adultery.

2nd. It was error to admit in evidence the indictment against Jim Craig.

3rd. It was error to admit in evidence the record of the conviction of Waco Hampton.

4th. It was error to disallow the witness, F. A. Caldwell, to testify as to why defendant was with Hampton.

5th. It was error to permit the district attorney to ask the witness, Hugh Hamilton, this question: "Did you know of John Brown (deft.), or *or* did you hear of his having introduced whiskey up there at any time?"

6th. It was error to permit in evidence to the jury the answer to the foregoung question that he had heard that defendant was a whiskey peddler.

7th. It was error to allow the district attorney to introduce and examine Watt Hampton as a witness against defendant because no notice had ever been served upon defendant that he would be called as

110 a witness against him.

8th. It was error for the court to charge the jury as follows:

"You then go to the killing and you ascertain how it was produced, the way it transpired; you see the character of the weapon used, how often it was used, whether it was deliberately and wilfully used at the time, and in such a state of case where the evidence shows that the killing was wilfully done, as I have already told you, if there is an absence from the case of that which shows that the party had a right to so wilfully kill, under the law of self-defense, or that the killing was wilful, but there were mitigating facts attending it, the proof which shows that it was wilfully done, shows that it was done with malice aforethought, and in a case of that kind the very same degree of proof that shows a wilfull killing, would show a killing with malice aforethought."

9th. It was error to charge the jury as follows:

"Manslaughter, says the law, is the wilfull killing of a human being without malice aforethought. It occupies a midway position between the state of case where the law of self-defense would apply and the state of case where the law defining murder would apply. It is a state of case that exists because of the wrongful act of the party or parties killed at the time of the killing, because of a wrongful act that is provocative in its character, and not so provocative as to excuse the crime, but so much as to reduce the grade of it. The law recognizes the fact that it usually occurs when it grows out of a state of violence when a killing occurs because of violence. When two men, for example, are engaged in an affray, in a fight or in an ordinary fisticuff, or fist and skull fight, as it were, and they enter into it, and they are engaged in it without
111 any purpose to take life, and one may get the advantage of the other, he may rain blows upon his person that cause pain and that cause the mind to be inflamed and excited, and if a party while in that condition, without previous preparation to take life, kills, that is manslaughter. But if there is any previous preparation, if he has prepared himself with a deadly weapon, and uses it for that purpose there, that shows deliberation, that shows premeditation, that shows a deliberate selection and use of a deadly weapon, and under the law that I have read to you that is one of the most powerful methods of ascertaining the existence of malice aforethought. But without any preparation of that kind, without any previous purpose to take life, suddenly upon the spur of the moment, while that affray exists, takes life, that is manslaughter, because of the wrongful act of the party who is killed putting his mind in a condition where the law contemplates that it acts from passion and not from a spirit of premeditation or deliberation."

10th. It was error for the court to charge the jury as follows:

"Now, in this case it becomes necessary to give you the law bearing upon the question of the rights of Whitehead and Poorboy. The record has been offered before you of a judgment of this court showing the conviction of Waco Hampton for the crime of manslaughter upon the charge of murder; the proof has been offered before you showing his escape from the place of confinement, the reform school, he being sent there because he was under the age to be sent to the penitentiary. The proof shows his escape from that place, and that he was back in the Indian country. That put him in the position of an escaped convict, of a man who had been convicted of a high crime and who had escaped from prison. Under the law any citizen had the right to arrest him; any citizen had the right to capture him, and they not only had the right to do that, but it was
112 their duty to do it. It was not necessary that any warrant should be issued to give any citizen the right to capture him. They had a right to effect his capture by all reasonable means that could be employed to accomplish the result, taking into account and into consideration that the citizen who entered upon that purpose had a right to stand upon the defensive to protect himself while he was lawfully seeking to execute that purpose."

11th. It was error for the court to charge the jury as follows:

"Now, again, the record has been offered before you in evidence showing the conviction of Jim Craig of the crime of adultery, for which he

was tried and convicted in this court. The proof shows that he stood charged with that crime at that time. Any citizen had the right to effect his arrest. It would be necessary for the citizen, in such a state of case as that, to show the existence of that crime if called upon to do it afterwards, and that there was a probable cause to believe that he was guilty of it. You have the right to take into consideration the judgment of this court as evidence of that crime, and as evidence of his guilt of it. That being the state of case, these two citizens, Whitehead and Poorboy, had a right to effect his arrest, and they had a right to use all reasonable means that night—on that, to them, fatal night—to ascertain whether these parties who were in the road there were either Waco Hampton or Jim Craig, and if while they were using means of that character, after ascertaining who they were, Hampton and this defendant, while acting in concert with him, Roach, if you please, too, put themselves in such an attitude of danger to these men while they were endeavoring to ascertain who these men were, then these men, Whitehead and Poorboy, had a right to put themselves in a defensive attitude, and protect themselves while they were making a reasonable effort to ascertain if these parties were either one of the parties that they had a right to arrest. They had that right as a citizen, if these conditions existed that I have indicated to you. They had a right, and it was not only a right, but a duty, if they had reason to believe that the men in that party might be the men that they were seeking, to use all reasonable means to ascertain that fact, and if while they were using those means they were fired upon by these parties, by this defendant, or by Waco Hampton, and he acting in concert with him, or whether these men put themselves in such an attitude by the use of their weapons as to indicate a deadly purpose, then the men who were seeking to make the necessary effort, if it was an effort of that kind, had a right to stand upon the defensive, and were only standing upon the defensive when they were making that effort. And while so situated, seeking to make that arrest, they had a right to subject other citizens to even temporary detentions that they might be enabled to ascertain whether other citizens were the ones they were seeking to arrest."

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12th. It was error for the court to charge the jury as follows:

"In passing upon the reasonableness of the testimony and its truthfulness you are to consider the relation the witnesses bear to the case and to the party on trial. You will bear in mind that people who are brought into court to testify to what they know, by the process of law are not in an attitude that from that attitude alone you have a right to draw an inference against their evidence, because they are performing but a simple duty. It is the duty of every man to obey the process of the law and to give his evidence in court. If they occupy a relation that puts them nearer to the case than that, then you may begin to consider that relation. That proposition more especially applies to the defendant in this case than anybody else. He is the party to be most seriously affected by the result of this case if you find him guilty and guilty of these two crimes, and these crimes are found by you to be murder, he is to pay the forfeit with his life. That is the law of the land enacted for the safety of the people, deemed by the lawmakers necessary for their safety, and it is necessary for the safety to be enforced to secure that safety. He is therefore in attitude of one who has the highest possi-

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ble interest that a man can have in this life to prompt him to present a state of case to you that you would believe to be favourable to him, in the light that it would benefit him, that would cause him to escape the penalties of the law, and he but possesses that characteristic of human nature that is possessed to a greater or less extent by all mankind when they are so situated that they are liable to be swayed from the truth even by consideration of the results that may follow to them from having the jury believe a state of case in opposition to them. You are to take that into consideration when the defendant as a witness goes upon the stand, not that you are necessarily to disbelieve what he may say because of that relation, but you are to weigh what he says in the light of the evidence. You are to examine it again in the light of the other evidence. If there are facts that are true in the case, that prove anything in the case, that sustains what he says it will strengthen his evidence. That is to say, it would be supported by such truths and be stronger than when unsupported and coming from such a witness. Then you view it in the light of other facts, in the light of other testimony. And you view it
115 in the light of the circumstances of the case. And in this connection we invoke the circumstantial testimony as being of the kind that is offered to us, and that at the same time is motiveless. There is no motive that can induce it to stand upon one side or the other. It is not under the influence of threats, flattery, bribery, or fear, but the circumstances of the case standing around the occurrences, the things connected with it at the time of the killing, the things occurring subsequent thereto are things that were created and brought into existence when their effect would not be foreseen, and they are so created and have such an existence that no motive can be used to influence them. They speak before you without fear, without favor, without affectation. Therefore it is your duty to take them into account, to take them into consideration, to see whether the positive facts coming especially from the defendant or from any other witness are corroborated by these inanimate evidences of the true nature of the occurrences. And then you are to take all the other evidence, whether it be positive or circumstantial in its character, and you are to see whether it contradicts the statements of the defendant as to the character of this occurrence, or whether it corroborates what he says."

13th. It was error for the court to refuse to charge the jury, as asked by the defendant, as follows:

"The evidence in this case shows that the deceased, Poorboy and Whitehead, were not officers, but were acting as private citizens, private individuals, without any warrant for Brown and having no charge against Brown. Therefore, if unintentionally or by mistake, believing him to be somebody else, they undertook to arrest defendant and the defendant resisted such an arrest, and in such resistance killed deceased, or killed the parties attempting such arrest, such killing would not be murder, but would be manslaughter.

116 Which charge the court gave with the following modification:

"Unless such killing was done in such a way as to show brutality, barbarity, and a wicked and malignant purpose. If it was done in that way, then it would still be murder."

14th. It was error for the court to refuse to give the following charge, as asked by the defendant, and to give as modified:

"If the jury find from the evidence in this case that the deceased, Poorboy and Whitehead, were not officers, and they were acting as private individuals, and were endeavoring or intending to arrest Jim Craig for a reward, and that they demanded the surrender of the defendant, thinking it was Jim Craig, and that they attacked the defendant with guns or pistols, then the defendant had a right to resist such an attack, even to the extent of taking the deceased's life, provided they further find that it was necessary to kill deceased in order to save his own life or to save himself from great bodily harm."

The court gave this charge with following modification: "But Poorboy and Whitehead had a right to arrest Waco Hampton for the offense such as I have named, and to arrest Jim Craig for the offense which I have already named, and they had a right to make all reasonable efforts to ascertain who Waco Hampton and who the defendant, Brown, and Roach were, and it was the duty of Hampton, the defendant, and Roach to give them all reasonable opportunity to ascertain who they were, and if, while they were doing that, Hampton and the defendant, Brown, offered acts of violence that endangered the lives of Poorboy and Whitehead, Poorboy and White-
117 head had a right to do whatever was necessary to defend their lives or persons from great violence arising from the acts done by these parties, or offered by them, or threatened by them in a violent way."

Wherefore, the above errors considered, the said defendant prays that the judgment and sentence against him be reversed and a new trial be granted him.

JOHN BROWN,
By C. J. FREDERICK,
GEO. A. GRACE,
His Attorneys.

(Endorsed on back:) Filed in open court Dec. 1, 1894. S. Wheeler, clerk.

118 *Poverty affidavit.*

United States circuit court, western district of Arkansas.

UNITED STATES
vs.
JOHN BROWN. } Murder.

I, John Brown, the defendant in the above stated cause, do solemnly swear that I am not possessed of sufficient means, and am not worth $10.00 above my wearing apparel, and am unable to procure the same to prosecute the appeal taken in said cause in the Supreme Court of the United States.

I therefore pray that it be prosecuted in forma pauperis.

JOHN BROWN.

Subscribed and sworn to before me the 1st day of Dec., 1894.

C. J. FREDERICK,
Notary Public.

(Endorsed on back:) Filed in open court Dec. 1, 1894. S. Wheeler, clerk.

119 *Petition for writ of error.*

United States circuit court, western district of Arkansas.

UNITED STATES
vs.
JOHN BROWN. } Murder.

To the clerk of the circuit court of the United States for the western district of Arkansas:

Your petitioner, John Brown, represents that at the August term, 1894, of said court he was convicted on an indictment charging him with the crime of murder, and that the said court pronounced judgment and sentence of death upon this petitioner upon the verdict of the jury convicting him as aforesaid. Your petitioner alleges that in the record and proceedings in the trial of said cause there is great and manifest error, to the prejudice and great damage of your petitioner. He therefore prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of said circuit court in said cause, removing said cause and the record therein to the said Supreme Court in order that the same may be there examined, and, if error be found, that judgment and sentence against him therein may be reversed.

JOHN BROWN.
By C. J. FREDERICK,
GEO. A. GRACE,
His Attys.

(Endorsed on back:) Filed in open court Dec. 1, 1894. S. Wheeler, clerk.

120 UNITED STATES OF AMERICA, ss.

To James F. Read, esq., U. S. atty. for the western dist. of Arkansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western dist. of Arkansas wherein John Brown, plaintiff in error, and the United States is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Isaac C. Parker, U. S. district judge for the western dist. of Arkansas this 4th day of December in the year of our Lord one thousand eight hundred and ninety-four.

I. C. PARKER,
U. S. Dist. Judge for Western Dist. of Ark., holding Circuit Court.

On this day of , in the year of our Lord one thousand eight hundred and ninety- , personally appeared before me, the subscriber, , and makes oath that he delivered a true copy of the within citation to .

Sworn to and subscribed the day of , A. D. 189 .

I hereby accept service of the within citation this 4th day of December, A. D. 1894.

JAS. F. READ,
U. S. Atty.

121 UNITED STATES OF AMERICA, ss.

The President of the United States to the honorable the judges of the circuit court of the United States for the western dist. of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between The United States and John Brown a manifest error hath happened, to the great damage of the said John Brown as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 3rd day of Dec., in the year of our Lord one thousand eight hundred and ninety-four.

STEPHEN WHEELER,
Clerk of the Circuit Court of the United States for the Western Dist. of Ark.
By I. M. DODGE, *D. C.*

Allowed by

Justice of the Supreme Court of the United States.

122 UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the Western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true and complete copy of the record in the case of U. S. vs. John Brown, the original of which remains of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 6th day of Dec., A. D. 1894.

S. WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

123 In the Supreme Court of the United States. October term, 1894

JOHN BROWN, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES. } No. 863.

STIPULATION.

It is hereby stipulated that in the printing of the record in the above-entitled cause, the clerk is authorized to omit the opinion of the court below on the motion for a new trial, being from pages 91 to 107 of the transcript.

C. J. FREDERICK,
Atty. for P. E.
LAWRENCE MAXWELL, Jr.,
Solicitor-General.

(Indorsement:) Case No. 15747. Supreme Court U. S. October term, 1894. Term No., 863. John Brown, plff. in error, vs. The United States. Stipulation to admit parts of record in printing. Filed Jany. 7, 1895.

(Indorsement on cover:) Case No. 15747. Term No., 863. John Brown, plaintiff in error, vs. The United States. W. Arkansas. C. C. U. S. Filed December 11, 1894.

Office Supreme Court, U. S.
FILED.
JAN 7 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

JOHN BROWN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 863.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

JOHN BROWN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 863.

MOTION TO ADVANCE.

This is a writ of error from a judgment of the circuit court of the United States for the western district of Arkansas sentencing the defendant to be hanged for a murder committed in the Cherokee Nation. The case was before this court during last term, when it was reversed and remanded for a new trial. See 150 U. S., 93.

The Solicitor-General respectfully moves the court to advance the case upon the docket and set it down for hearing during the present term.

Notice of this motion has been given to the plaintiff in error, and proof thereof filed with the clerk.

Authority is hereby given to print the record at Government expense.

LAWRENCE MAXWELL, Jr.,
Solicitor-General.

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Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

....IN THE....

SUPREME COURT OF THE UNITED STATES.

No. ---

JOHN BROWN, Plaintiff in Error.

vs

THE UNITED STATES,

The plaintiff in error, John Brown was tried, convicted and sentenced to be hanged, on an indictment charging him with the murder of Josiah Poorboy, and Thomas Whitehead. The killing occured in the Indian Territory. Defendant and Waco Hampton were at the house of Mrs. Hitchcock, and Roach came there —after a while Hampton and Roach started to leave

and asked Brown to go with them--that they were going up the road a couple of miles to see Jim Craig. Brown consented to go and rode behind Roach on the same horse, Hampton riding alone. Roach had a shot gun and Brown was carryiny Hampton's gun. Hampton had a pistol. They passed Judge Shirley's, where the fight occured on their return, and went about two miles. Coming back talking loud and singing, they crossed a small stream 200 yards from Shirley's. The horse defendant and Roach were riding, stopped to drink. Hampton rode on and stopped at the gate at Shirley's. When defendant rode up two men were talking with Hampton and defendant and Roach rode past Hampton about thirty steps, when Hampton called for them to stop. They did so, and told Hampton to come on. He rode toward them when one of the men, Poorboy, took hold of his bridle rein and told him to dismount and give up. The other man, Whitehead, went up to Roach and Brown and asked them if either of them was Matthew or Jim Craig. They replied no, and were told to get down and lay down their guns. This they began doing and in the meantime firing commenced between Hampton and Poorboy, resulting in Poorboy's death, after which Hampton continued to fire toward Whitehead and his party. Roach was struck by a ball and ran away. Brown was struck on the leg, cutting his pants, and Whitehead was killed.

An assignment of errors was duly filed. (Record p. p. 46 to 50.) These errors are herein relied upon, except the 4th assignment.

The first assignment is as follows:

"It was error for the court to admit in evidence before the jury the record of the conviction of Jim Craig for Adultery."

The 2nd assignment was as to the indictment against Craig. Craig was not on trial, nor were defendant or Hampton connected with Craig in any manner as to said charge of adultery or the charge on trial.

The conviction of Adultery was in 1892, a year after the homicide—(Record p. 16 and p. 8.) The conviction could therefore have no effect to justify or excuse deceased in arresting defendant instead of Craig

The 3rd assignment, is as follows: "It was error to admit in evidence the record of the conviction of Waco Hampton." (R. p 17.)

The evidence shows that Waco Hampton was in company with defendant and witness Roach when the difficulty arose, and that the one deceased man Poorboy, was attempting to arrest said Hamption and that the other one, Whitehead, was attempting to arrest the defendant under the belief, suspicion or pretense that he was Craig.

But it would not be any legal ground for arrest ing said Hampton because he had formerly been con

victed of manslaughter. It is fair to presume that a man who has been convicted of manslaughter has either had that judgment reversed or has been pardoned, or he has served out his sentence. However that may be, we know as a legal proposition that a former conviction of manslaughter is not a justification or excuse for an arrest of such convicted party, and that such party is still entitled to the protection of the law. There is nothing else in the evidence to connect this isolated fact with any other circumstances which would with them make it material. This was a manifest error.— 5th. ssignment. "It was error to permit the District Attorney to ask the witness Hugh Hamilton this question: Did you know of John Brown (deft.) or did you hear of his having introduced whisky up there at any time?"

6th. "It was error to permit in evidence to the jury the answer to the foregoing question that he had heard that defendant was a whisky peddler." (Record p. 17.)

The last two assignments show an attempt to prove defendant guilty of other crimes than the one charged in the indictment. This cannot be done. Boyd & Standley vs. United States. 142 U. S. 450.

To introduce whisky into the Indian country is a crime punishable by imprisonment in the penitentiary not exceeding two years and fine of not more than

$300. U. S. Rev. Stat. Sec. 2139. The mere possession of spirits there is prima facie proof of introduction.

The question to the witness was not limited to reputation of defendant (even if it would have been admissible) but asked as to his own knowledge of a specific offense by defendant. (Record p. 19.)

7th. Assignment was as to calling a witness by the government whose name was not endorsed on the indictment or notice given to defendant.

The 9th assignment alleges error in the charge of the court. See Record Page 47. What is there said about previous preparation is not applicable to the facts in evidence and presupposes a state of facts not proved. All the facts show that the conflict was entirely unexpected by defendant. The charge also leaves out of view the right of defendant to bear arms and the law that the mere possession of arms does not show an illegal preparation for violence. Gourko vs. U. S. 153 U. S. 183. The charge also in effect directs the jury or at least permits them to draw from this supposed preparation the inference of malice aforethought.

The 10th assignment alleges error of law in the charge to the jury. See Record p. 47. What is said under the 3rd. assignment is applicable also to this; both refer to the admission of the record of conviction of Waco Hampton of manslaughter. The court also says: "The proof has been offered before you showing his

escape from the place of confinement," and proceeds to found upon this fact the right of deceased to arrest him.

Judging from the record which "imports absolute verity" we must conclude that the court was in error sa to the proof on this point. There is nothing in the evidence as stated in the bill of exceptions in any way tending to prove that Waco Hampton was an escaped convict. The charge must be weighed by the evidence as contained in the record; the record cannot be hewed down or built up to conform to the charge of the court.

This part of the charge was very important; it rescued the deceased from the position of making an armed and violent attack without excuse upon the defendant while he was innocently passing on the public highway. It was highly prejudicial.

The 11th. assignment also alleges error in the charge: Record p. 47. This may be considered in connection with the 1st. and 2nd. assignments. It refers to the charge of adultery against Jim Craig.

The plaintiff in error earnestly contends that the whole charge contained in this assignment is error; that the deceased had a right to arrest Jim Craig gave them no right to arrest John Brown, that such right cannot justify an indiscriminate attack upon any and everybody passing upon the highway; that

the right to resist an illegal arrest is destroyed by the theory of the court; that the right of self-defense would thus be postponed to determine if the assailant was not acting under a mistake. See Starr vs U. S. 153 U. S. 614.

The 12th. assignment (See Record p. 48) alleges error in the charge of the court. It errs in singling out the defendant as a witness and giving rules to weigh his evidence in particular and in a eulogy of circumstantial evidence which does not allude to its weaknesses and dangers.

13th. Assignment. See Record p. 49. Here the court erred in modifying the instruction asked by defendant.

14th. Assignment. See Record p. 50. In this the Court erred in refusing the instruction asked and in modifying said instruction as given. The same errors as to Jim Craig and Waco Hampton already noted under assignments 3, 4, 10, 11, were here repeated.

Respectfully Submitted.

W. M. CRAVENS,

Counsel for P. E.

Office Supreme Court, U. S.
FILED.
APR 3 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

JOHN BROWN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
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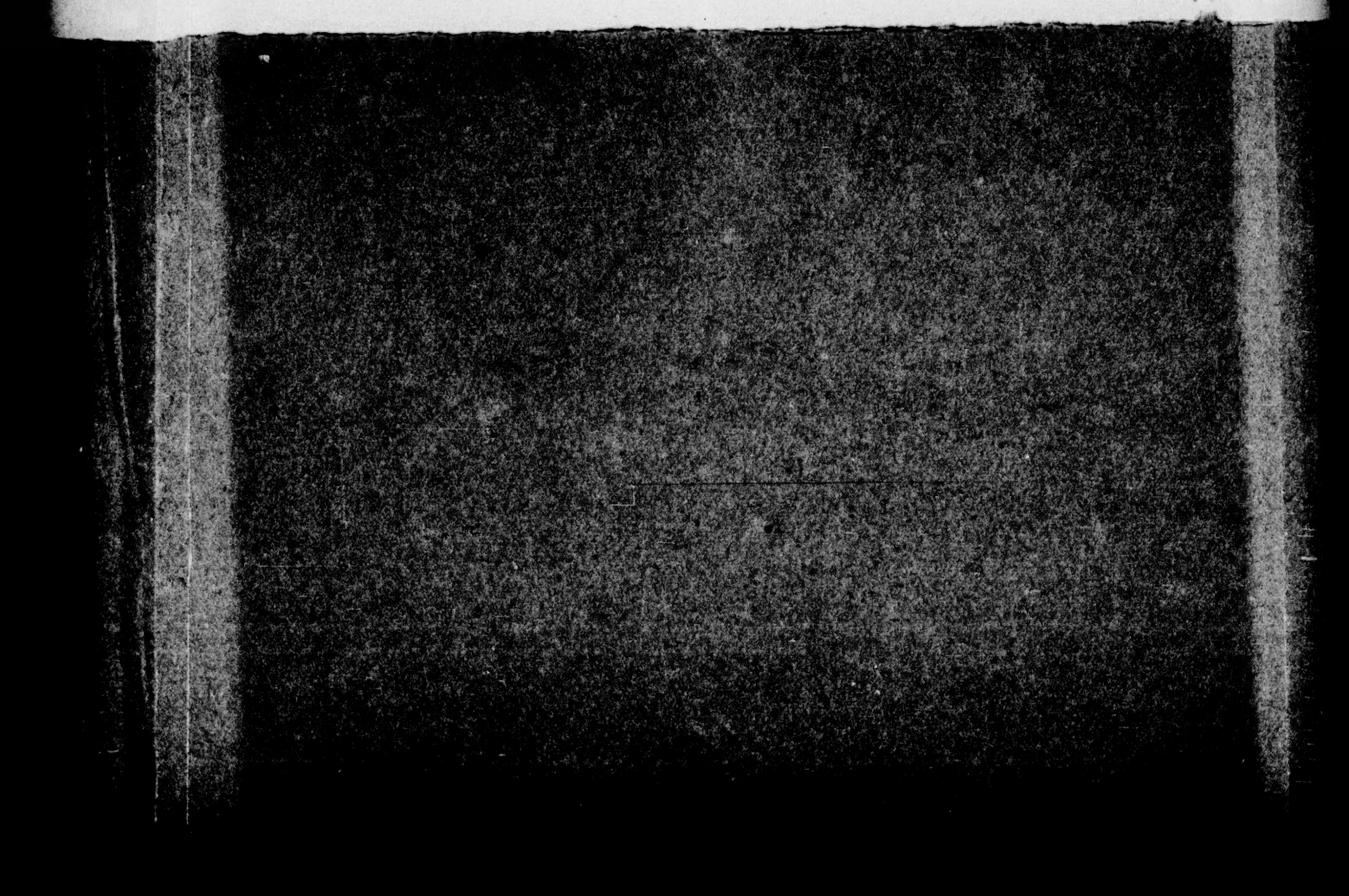
IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.



In the Supreme Court of the United States.

OCTOBER TERM, 1894.

JOHN BROWN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 863.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

At the October term, 1893, this court reversed a judgment of death passed upon the plaintiff in error on a conviction upon an indictment charging him, in separate counts, with the murder of Josiah Poorboy and Thomas Whitehead, in the Cherokee Nation, on December 8, 1891. (150 U. S., 93.)

Plaintiff in error has been a second time convicted of murder, and now seeks a reversal of the judgment entered upon such second conviction.

The homicide occurred at the house of L. W. Shirley (Rec. 7, 8). Poorboy, an Indian, had been sent by a

deputy marshal named Lamb to arrest one James Craig, who had escaped from custody while under arrest for adultery with one Annie Hitchcock. Poorboy started for his destination on the forenoon of the day of the killing, carrying a pistol (Lamb, p. 11); borrowed a Winchester (Weeley Shirley, p. 12), and stopped that night at L. W. Shirley's house, where also was one Whitehead—a detective—who had been stopping there several days, and was also hunting for Craig (pp. 7, 8); Whitehead had a pistol and some money (Annie Shirley, p. 8).

About half past four that afternoon defendant, with one Wacoo Hampton, James Craig, and one or two others were together "shooting at trees" (Foreman and Still, p. 14); Hampton was an Indian, a young desperado (Sullivan, p. 8), who had been convicted of manslaughter (p. 14), and had escaped from the reform school about three or four months before the killing (Hamilton, p. 10), and officers were looking for him with a warrant at the time of the killing (Bruner, p. 12). Hampton's christian name is spelt sometimes "Waco," and sometimes "Wakoo." We adopt the spelling used in the opinion of this court.

Brown lived at Hampton's home; they were in each others company a good deal, and were in the habit of carrying Winchesters and pistols (Sullivan, p. 8; Mrs. Manus, p. 15).

Defendant, Hampton, and one John Roach went to Annie Hitchcock's about dusk that evening, Brown carrying a Winchester and Roach a double-barreled shotgun (Caywood, p. 9), remained about three-quarters of an hour, and took several drinks of whiskey. Hampton had

a pistol (Roach, p. 12). The trio on leaving Hitchcock's, started for Cob Hill to meet Craig, passing Shirley's residence on the way.

Not meeting Craig, they started on their return, Brown and Roach on one horse, Brown riding behind. As they neared the Shirley place Hampton discharged his pistol, dismounted opposite the house, went to the gate and called out Whitehead (Roach, p. 12), who, with Poorboy, was in the room next to the gate; and in answer to the call Poorboy and Whitehead went outside (Mrs. Shirley, p. 8). When Hampton went up to the gate Roach and the defendant waited for him about fifteen or twenty steps away, and as Poorboy and Whitehead came out to the gate Hampton came down to where Brown was. Roach swears that his party knew that Whitehead was at Shirley's, and details, at pages 12 and 13 of the record, what happened on the appearance of Poorboy and Whitehead.

Poorboy announced himself as Heck Bruner (a deputy marshal), and Hampton immediately started off, when Poorboy caught his horse by the bridle. Whitehead then came up to Brown and Roach, claimed to be an officer, and asked Roach if he was Matthew or Jim Craig, to which Roach answered no. Whitehead, however, ordered Roach to get off his horse and consider himself a prisoner. As soon as he did so, Whitehead told Roach to lay down his shotgun, which he did; and while holding his horse with his left hand, and on a line between Whitehead and Brown, Roach was shot in the arm and shoulder by a shot from the direction of the latter. This Roach swears was the first shot fired. Roach's horse jumped and jerked him

down. He got up and started off, the firing meanwhile becoming rapid. When a short distance away, he looked back, and saw Brown shoot Whitehead while Whitehead was already lying on the ground.

Meanwhile, when Poorboy seized the bridle of Waco Hampton's horse he ordered Hampton to surrender, stating that he was a marshal and had a right to arrest him. Instead of surrendering, Hampton jumped off his horse on the opposite side and fired at Poorboy. Roach testifies that the firing by Hampton began immediately after the shot from the direction of Brown.

Whitehead was not doing anything at the time the first shot was fired, and made no use of his pistol.

After the killing, Hampton took Poorboy's gun from under him, and when he and Brown got up to Roach Brown had Whitehead's pistol. Brown returned to where the bodies were and got Roach's shotgun.

Mrs. Shirley testifies that while the shooting was in progress (p. 8), shortly after Poorboy and Whitehead left the room, she heard guns fire and a voice, which she believed to be Whitehead's, say: "Hold on, John Brown; I am your friend," and the reply came, "By God, we are fighters from the West." She further testifies that the guns and pistols of Whitehead and Poorboy, the belt of Poorboy, and the money of Whitehead were missing when the bodies were examined next morning. On the morning after the killing, Brown admitted, in the presence of Craig, to Frank Hamilton that he killed Whitehead (p. 11), and also made the same admission to others (Caywood, p. 10; Hale, p. 14).

Mr. and Mrs. Manus, Hampton's stepfather and mother, testified (p. 15) that defendant and Hampton called at their house a couple of hours after the killing and showed the gun and pistols taken from the dead men; and that Brown exhibited three dollars in silver, which he stated that he had taken from Whitehead, stating further that he had shot Whitehead in the forehead.

Beside Mrs. Shirley and Roach, the only other living person who saw or heard any of the occurrences connected with the killing, was the defendant Brown, whose testimony appears at pages 18 and 19 of the record.

Brown testifies that the first shooting was between Hampton and Poorboy; that Hampton, on being ordered to get down from his horse, jumped on the opposite of his horse from Poorboy and commenced firing; that on being asked by Whitehead if he were Matthew or Jim Craig, Roach said no, and on being ordered to do so, dismounted, as did Brown; that he (Brown) was told to lay down his gun, but did not do it; didn't notice whether Roach threw down his gun; that about the time Hampton commenced firing he felt something strike his pants, and thought he was shot; heard Roach holler, and "about that time Hampton had killed his man and was shooting at this other man, and I drew up my gun and fired only one shot, or tried to fire. Am not sure whether I fired or not."

Brown denies taking any money or property from either one of the deceased, or exhibiting any money to Mr. and Mrs. Manus.

Poorboy was shot three times in the arm, twice in the body, once in the side of the face, and once in the nose. (Thompson, Rec., p. 9.)

Whitehead was shot in the neck, centre of forehead, and in the body, apparently while lying on his back. (Thompson, p. 9; and see Roach, p. 13; Manus, p. 15.)

After the killing, Brown, Hampton, and Roach left the bodies where they fell and went to Annie Hitchcock's (Roach, p. 14; Caywood, p. 9); from there Brown and Hampton appear to have gone to Hampton's home (Sam Manus, p. 5), but wound up at Hamilton's, where they slept in the stable loft, and Jim Craig was with them at Hamilton's house next morning. (Hamilton, p. 10.)

Hampton was killed a few days after the homicide while resisting arrest, and Brown was arrested the day following Hampton's death, while in bed and making an effort to get his gun to shoot the officers. (Bruner, pp. 11, 12.)

On October 20, 1894, the jury returned separate verdicts (p. 5), finding the defendant guilty of murder as charged in each of the counts of the indictment; and, motion for new trial being overruled, sentence of death was passed on the defendant upon the count for the killing of Whitehead (p. 6).

The assignment of errors appears at pages 46 to 50 of the record.

ARGUMENT.

No error has been assigned to the action of the court in suspending sentence upon the verdict on the first count of the indictment. The order, however, in the particular mentioned did not prejudice the substantial rights of the accused, and would constitute no reason in itself for the reversal of the judgment. (*Pointer* v. *United States*, 151 U. S., 396, 419.)

I, II, III.

Records of indictment and conviction of Jim Craig for adultery, and conviction of Wacoo Hampton for manslaughter.

The indictment of Jim Craig was clearly relevant, as explaining the presence of Poorboy and Whitehead and their actions just before the killing. They had plainly a right to take a good look at the riding party, under the suspicious circumstances of the case, to make sure that Craig was not one of them. It is not expressly stated that they had a warrant for Craig, but that is a possible inference from the testimony of John Shirley (p. 8) and Lamb (p. 11).

Wacoo's conviction was relevant, as showing that he was eluding the officers, and as bearing on the intent of defendant, his constant companion, the probable reason for defendant's being armed, and the probability of defendant's being surprised at the affray; especially in view of the testimony that Heck Bruner was looking for Wacoo with a warrant (pp. 11, 12), and that defendant thought it was Heck Bruner they had killed (pp. 9, 10, 15).

Moreover, both of these facts had already been testified to orally without objection, so that the records can have done no harm (pp. 8, 10, 11, 12).

The record of Craig's subsequent conviction was harmless. The actual firing, by defendant's own admission, had nothing to do with the Craig episode (XI, *infra*), although it was a search for Craig that brought the parties together.

IV.

The fourth assignment of error seems to refer to an exception noted on page 17 of the record. This relates simply to the exclusion of an "offer to prove" by the witness "a conversation between himself and Wacoo Hampton some time before the killing." The purport even of the conversation is not given.

V and VI.

The fifth and sixth assignments of error were to a question propounded on cross-examination of Hugh Hamilton, a witness for the defendant, and to the answer. Hamilton, on direct examination, had testified that he knew the reputation of defendant as a peaceable and law-abiding man to be good, and he was asked on cross-examination, by the district attorney, if he knew or had heard of the defendant having introduced whisky up there (Cherokee Nation) at any time, to which he answered that he had heard that defendant was a whisky peddler.

The introduction of ardent spirits into the Indian country being a penal offense (Rev. Stat., § 2139), the cross-examination tended to show that the reputation of defendant as a "law-abiding" citizen could not have been good, as claimed by the witness. By putting in this evidence of good character defendant opened the door for all proper cross-examination, and can not complain if this brought out the fact that he was guilty of another crime. (*Moore* v. *United States*, 150 U. S., 57, 61.)

VII.

The seventh assignment of error reads:

> It was error to allow the district attorney to introduce and examine Watt Hampton as a witness against defendant, because no notice had ever been served upon defendant that he would be called as a witness against him.

The objection appears on page 19, and was to an "offer to introduce" Watt Hampton as a witness, by way of rebuttal. It nowhere appears, however, that the offer was followed by the examination of Hampton. It is therefore unnecessary to discuss the contradictory state of the record. Hampton's name was endorsed on the indictment as a witness for the Government (p. 3), and the record of the proceedings of October 17, 1894, recites that defendant had been served with "a full and complete list of the witnesses in this cause" (p. 4).

VIII.

The eighth assignment of error relates to a portion of the charge which appears on page 30 of the record. It is, in substance, an instruction that if the proof showed that the killing (which was not disputed to have been with a deadly weapon) was wilful, and was not committed in self-defense or was not attended with mitigating circumstances, it was a killing with malice aforethought.

It being sufficient that the killing was with malice, express or implied, and the law implying malice from the intentional use of a deadly weapon, without just cause or excuse, the instruction was not objectionable.

IX.

There is an error in the first line of this assignment. "Wilful" should read "unlawful" (p. 35).

It was proper to comment upon the law as to previous preparation, because Brown admittedly went armed and made no claim to being armed for a lawful purpose. He was prepared for a fight, though apparently not for a fight with these particular people. The circumstances of this case are totally unlike those of *Gourko* v. *United States* (153 U. S., 183) and *Thompson* v. *United States* (155 U. S., 271), on the one hand, and *Collins* v. *United States* (150 U. S., 62), on the other. If the instructions are correct in their application to the case in hand, it is sufficient (*Spalding* v. *Castro*, 153 U. S., 38), and the whole charge is to be read together (*Collins* v. *United States*, *supra*).

If Brown believed himself shot in the leg, having been previously a noncombatant, and fired in self-defense, he was entitled to an acquittal. If the testimony of the other witnesses is to be believed, he was guilty of murder. He was not entitled to instructions as to manslaughter unless there was evidence tending to sustain a verdict of manslaughter, for otherwise the jury could not find such a verdict. (*Sparf* v. *United States*, 156 U. S., 51, 63; *State* v. *Talbott*, 73 Mo., 347; *State* v. *Shippey*, 10 Minn., 223, 232; *State* v. *Smith*, 57 N. W. Rep., 325, 326.) The court had carefully limited the definition of murder, and had even been somewhat full in its discussion of that matter. If it gave too narrow a definition of manslaughter, therefore, the result would be to improve the chances of acquittal, a course by which the prisoner is hardly prejudiced.

X.

This assignment of error relates to the instructions that an escaped convict, under conviction for manslaughter, could be arrested without a warrant.

This instruction (p. 36) was given upon the theory that the killing of the deceased was in an endeavor to aid Hampton in resisting a lawful arrest. Hampton was an escaped felon and was keeping out of the way of the authorities. (Hamilton, p. 10; Bruner, pp. 11, 12.) Poorboy, on commanding Hampton to surrender, announced himself as a deputy marshal named Heck Bruner. (Roach, p. 12; Manus, p. 15; Caywood, p. 9; Hamilton, pp. 10, 11). It is probable that Hampton was ignorant of Poorboy's arrival, and that Poorboy, who had just come from the marshal's office, might have recognized Hampton or learned his identity from Whitehead. Hampton, himself, the evening after the killing, in talking with the defendant, said "the marshals had him in a close place, and if it had not been for defendant, Brown, they would have got him." Brown said, "yes," etc. (Hale, p. 14.)

Manslaughter being a felony, it was lawful for any private person, upon reasonable suspicion, without warrant, to arrest the felon, even after escape from prison (*State* v. *Holmes*, 48 N. H., 377); it was competent to prove the commission of crime as justifying the arrest without warrant (*People* v. *Wilson*, 141 N. Y., 185); and the indictment and record of conviction were proper proof of guilt. (1 *East*, 300, 301; *Wakely* v. *Hart*, 6 Binn., 316, 318, 319; and see *State* v. *Anderson*, 1 Hill (S. C.), 327, 340.)

Upon the trial of an accessory, record evidence of the conviction of the principal is prima facie proof of the guilt of the principal. (*Whar. Crim. Ev.*, § 602.)

The conviction supported the prima facie proof of guilt raised by the indictment.

Whether or not the deputies had recognized Hampton does not appear; but Brown had every reason to suppose that they had done so, and therefore that they had the right to arrest him.

XI.

This assignment of error includes, among many other things, a remark that "any citizen" had the right to arrest Jim Craig.

This remark was based upon the theory that adultery, the crime with which he was charged, was a "statutory felony." The learned judge's opinion on the motion for a new trial explains this, relying on Hawley on Arrest, on *Holley* v. *Mix* (3 Wend., 350), and other cases therein cited. This opinion is part of the transcript of record, although not printed.

The learned judge's theory, it may be conceded, is overthrown by the definition of felony now settled since *Bannon* v. *United States*, decided March 4, 1895. Adultery was once a crime at common law, but not for a long period prior to the Revolution, and therefore no arrest could be made without a warrant.

The remark, however, had no relevance to the case, and could do no harm to defendant. He does not claim to have been resisting an unlawful arrest, but to have engaged in a general affray commenced by his own companion,

Hampton, who, as he knew, was liable to arrest. The Jim Craig affair cut no actual figure in the fight.

Defendant does not claim to have been influenced in any way by fear of his own arrest or that of Roach, which was avoidable by mere reference to the Shirleys, nor does he claim that Hampton was mistaken for Craig.

But fear of an unlawful arrest does not justify killing unless there is fear of great bodily harm, or at least of some force. (*Noles* v. *State*, 26 Ala., 31; *State* v. *Underwood*, 75 Mo., 230, 238.)

XII.

The court's comments on defendant's testimony are justified by *Reagan* v. *United States*, and *Johnson, alias Overton*, v. *United States*, decided March 25, 1895.

XIII.

This assignment is not based upon any definite exception. The instruction seems unexceptionable. (*Brown* v. *United States*, 150 U. S., 93, 95; *Brooks* v. *Commonwealth*, 61 Pa. St., 352, 357; *Galvin* v. *State*, 6 Cold., 283, 284, 290; see also *Rafferty* v. *People*, 69 Ill., 111; *State* v. *Ashley*, 45 La. An., 1036.)

XIV.

This also is not based upon a definite exception. Nothing further need be added here to the remarks under XI, *supra*.

Respectfully submitted.

EDWARD B. WHITNEY,
Assistant Attorney-General.
WM. H. POPE.

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Copy

AFFIDAVIT.

STATE OF WEST VIRGINIA,

COUNTY OF CABELL, TO-WIT:

John B. Laidley, being duly sworn, says that he is the defendant in a writ of error pending in the Supreme Court of the United States, in which the Central Land Company of West Virginia is plaintiff in error; that the action in which said writ of error was awarded is an action of ejectment to try the title to a tract of land situate in the City of Huntington, County of Cabell, State of West Virginia; that said tract is a strip bounded by two parallel, straight lines nearly 800 feet apart, extending from the Ohio river in a Southerly direction nearly one mile across the river bottom, and nearly parallel with the lines of the streets of said City; the avenues of said City run East and West across said land nearly parallel with the river.

Affiant says that 9th and 10th streets and 3rd and 4th avenues are at present the business center of said City, said streets extending from the steamboat landing to the C. & O. depot. That the upper line of said tract crosses 2nd avenue near the river bank at the West line of 7th street, 3rd avenue near the middle of 7th street, and 4th avenue near the East line of 7th street, just two blocks from the business center.

Affiant says that the Court House block has lately been located partly on the said land between 4th and 5th avenues with a view to the erection of a handsome Court House and Jail.

And that at a meeting of the City Council in the month of October, 1892, a motion was made in said Council, and which was favored by all the members of the Council as affiant is informed, looking to the purchase of a portion of said land lying on 4th avenue just West of the Court House square and 7th street for the purpose of erecting a Town Hall for City purposes at the City's expense, and also a public Market House at the City's expense; that action on said motion was postponed for the present.

majority of

And affiant says that since the decision of the Supreme Court of Appeals of West Virginia on the 26th day of

November, 1887, on a former writ of error in said action of ejectment, declaring void the deed of S. H. G. Pennybacker to C. P. Huntington, dated February 25, 1870, under which the Central Land Company claims title to said land, a large number of persons relying upon said decission have purchased parcels of said land from said Laidley and are anxious to build upon and improve the same. Such purchases are located on 2nd, 3rd, 4th, 5th, 6th, and 7th avenues in said City; that the pendency of this writ of error keeps the title so unsettled that such owners will not improve their property, and others are prevented from buying land lying in said strip, and thereby the growth and improvement of the City is seriously and materially retarded.

Affiant further says that the City of Huntington has now a population of about 15,000. That Central City has been founded adjoining said City of Huntington on the West, and only five squares West of the West line of said strip, and has now a population of something over 1000, and both cities are rapidly growing in population and wealth.

Affiant says that the Central Land Company of West Virginia, which owns nearly all the land in said City West of said strip, refuses to sell any lots whatever lying West of said strip between said Central City and said strip of land on account of this litigation, thereby also greatly hindering the growth of said City in a Westerly direction.

Believing that an early decision of the motion to dismiss the writ of error to be submitted on the 12th day of December, 1892, will have a tendency to dispel the cloud upon the title to said land and promote the interests of said City, the affiant asks in behalf of himself and the purchasers aforesaid, and in behalf of the City of Huntington, that the Honorable, the Supreme Court of the United States, will take decisive action upon said motion to dismiss the writ of error aforesaid.

John B Laidley

TAKEN, SWORN TO AND SUBSCRIBED before me in my said County, this 18th day of November, 1892.

Geo. M. McClennan,
Notary Public.

Chief Justice & Associate Justices

To the Honorable the ~~Judges~~ of the Supreme Court of the United States:

The undersigned petitioners have read the affidavit hereto annexed, of John B. Laidley, defendant in the writ of error pending in the Supreme Court of the United States, in which the Central Land Company of West Virginia is plaintiff in error, and we adopt the allegation of said affiant as our own, and join in the prayer contained therein.

W. H. Bull, Mayor,

J. K. Ouey
C. E. Givins
J. F. Stewart
Jas. S. Sulphin
Jno A. Cassler
B. K. Stanley
E. A. Burnett

} Members of the City Council of the City of Huntington

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Rufus Switzer
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W. J. Parsons
F. L. Doolittle
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J. J. Bryan
E. C. Horlacher
C. Cohen
J. K. Ong, Cashier Bank of Huntington
J. L. Caldwell, Pres. Cen. L. & Ry Co.
J. T. Wilson, Constable
J. H. Holt
J. S. Terry

The names of twenty five others can be added to the above list if desired if necessary

J. B. Gaddy, Atty.

STATE OF WEST VIRGINIA,

COUNTY OF CABELL, TO-WIT:

John B. Laidley, being duly sworn, said that he gave a true copy of the foregoing affidavit and petition hereto annexed to H. C. Simms, attorney for the Central Land Company of West Virginia, at the city of Huntington, County of Cabell, State of West Virginia, on the Twenty-first day of November, 1892: and that the signatures to said petition are genuine.

John B Laidley

Taken, sworn to and subscribed before me in my said county this Twenty-first day of November, 1892.

Geo. M. McDermit,

Notary Public.

Office Supreme Court, U. S.
FILED,
JAN 7 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

JOHN BROWN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 863.

MOTION TO ADVANCE.

863

Office Supreme Court, U. S.
FILED.
MAR 14 1895
JAMES H. McKENNEY,
CLERK.

....IN THE....

SUPREME COURT OF THE UNITED STATES.

No. ---

JOHN BROWN, Plaintiff in Error.

vs

THE UNITED STATES.

The plaintiff in error, John Brown was tried, convicted and sentenced to be hanged, on an indictment charging him with the murder of Josiah Poorboy, and Thomas Whitehead. The killing occured in the Indian Territory. Defendant and Waco Hampton were at the house of Mrs. Hitchcock, and Roach came there —after a while Hampton and Roach started to leave

victed of manslaughter. It is fair to presume that a man who has been convicted of manslaughter has either had that judgment reversed or has been pardoned, or he has served out his sentence. However that may be, we know as a legal proposition that a former conviction of manslaughter is not a justification or excuse for an arrest of such convicted party, and that such party is still entitled to the protection of the law. There is nothing else in the evidence to connect this isolated fact with any other circumstances which would with them make it material. This was a manifest error.— 5th. ssignment. "It was error to permit the District Attorney to ask the witness Hugh Hamilton this question: Did you know of John Brown (deft.) or did you hear of his having introduced whisky up there at any time?"

6th. "It was error to permit in evidence to the jury the answer to the foregoing question that he had heard that defendant was a whisky peddler." (Record p. 17.)

The last two assignments show an attempt to prove defendant guilty of other crimes than the one charged in the indictment. This cannot be done, Boyd & Standley vs. United States. 142 U. S. 450.

To introduce whisky into the Indian country is a crime punishable by imprisonment in the penitentiary not exceeding two years and fine of not more than

$300. U. S. Rev. Stat. Sec. 2139. The mere possession of spirits there is prima facie proof of introduction.

The question to the witness was not limited to reputation of defendant (even if it would have been admissible) but asked as to his own knowledge of a specific offense by defendant. (Record p. 19.)

7th. Assignment was as to calling a witness by the government whose name was not endorsed on the indictment or notice given to defendant.

The 9th assignment alleges error in the charge of the court. See Record Page 47. What is there said about previous preparation is not applicable to the facts in evidence and presupposes a state of facts not proved. All the facts show that the conflict was entirely unexpected by defendant. The charge also leaves out of view the right of defendant to bear arms and the law that the mere possession of arms does not show an illegal preparation for violence. Gourko vs. U. S. 153 U. S. 183. The charge also in effect directs the jury or at least permits them to draw from this supposed preparation the inference of malice aforethought.

The 10th assignment alleges error of law in the charge to the jury. See Record p. 47. What is said under the 3rd. assignment is applicable also to this; both refer to the admission of the record of conviction of Waco Hampton of manslaughter. The court also says: "The proof has been offered before you showing his

escape from the place of confinement," and proceeds to found upon this fact the right of deceased to arrest him.

Judging from the record which "imports absolute verity" we must conclude that the court was in error sa to the proof on this point. There is nothing in the evidence as stated in the bill of exceptions in any way tending to prove that Waco Hampton was an escaped convict. The charge must be weighed by the evidence as contained in the record; the record cannot be hewed down or built up to conform to the charge of the court.

This part of the charge was very important; it rescued the deceased from the position of making an armed and violent attack without excuse upon the defendant while he was innocently passing on the public highway. It was highly prejudicial.

The 11th. assignment also alleges error in the charge: Record p. 47. This may be considered in connection with the 1st. and 2nd. assignments. It refers to the charge of adultery against Jim Craig.

The plaintiff in error earnestly contends that the whole charge contained in this assignment is error; that the deceased had a right to arrest Jim Craig gave them no right to arrest John Brown, that such right cannot justify an indiscriminate attack upon any and everybody passing upon the highway; that

the right to resist an illegal arrest is destroyed by the theory of the court; that the right of self-defense would thus be postponed to determine if the assailant was not acting under a mistake. See Starr vs U. S. 153 U. S. 614.

The 12th. assignment (See Record p. 48) alleges error in the charge of the court. It errs in singling out the defendant as a witness and giving rules to weigh his evidence in particular and in a eulogy of circumstantial evidence which does not allude to its weaknesses and dangers.

13th. Assignment. See Record p. 49. Here the court erred in modifying the instruction asked by defendant.

14th. Assignment. See Record p. 50. In this the Court erred in refusing the instruction asked and in modifying said instruction as given. The same errors as to Jim Craig and Waco Hampton already noted under assignments 3, 4, 10, 11, were here repeated.

Respectfully Submitted.

W. M. CRAVENS,

Counsel for P. E.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

JOHN BROWN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 863.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

At the October term, 1893, this court reversed a judgment of death passed upon the plaintiff in error on a conviction upon an indictment charging him, in separate counts, with the murder of Josiah Poorboy and Thomas Whitehead, in the Cherokee Nation, on December 8, 1891. (150 U. S., 93.)

Plaintiff in error has been a second time convicted of murder, and now seeks a reversal of the judgment entered upon such second conviction.

The homicide occurred at the house of L. W. Shirley (Rec. 7, 8). Poorboy, an Indian, had been sent by a

deputy marshal named Lamb to arrest one James Craig, who had escaped from custody while under arrest for adultery with one Annie Hitchcock. Poorboy started for his destination on the forenoon of the day of the killing, carrying a pistol (Lamb, p. 11); borrowed a Winchester (Weeley Shirley, p. 12), and stopped that night at L. W. Shirley's house, where also was one Whitehead—a detective—who had been stopping there several days, and was also hunting for Craig (pp. 7, 8); Whitehead had a pistol and some money (Annie Shirley, p. 8).

About half past four that afternoon defendant, with one Wacoo Hampton, James Craig, and one or two others were together "shooting at trees" (Foreman and Still, p. 14); Hampton was an Indian, a young desperado (Sullivan, p. 8), who had been convicted of manslaughter (p. 14), and had escaped from the reform school about three or four months before the killing (Hamilton, p. 10), and officers were looking for him with a warrant at the time of the killing (Bruner, p. 12). Hampton's christian name is spelt sometimes "Waco," and sometimes "Wakoo." We adopt the spelling used in the opinion of this court.

Brown lived at Hampton's home; they were in each others company a good deal, and were in the habit of carrying Winchesters and pistols (Sullivan, p. 8; Mrs. Manus, p. 15).

Defendant, Hampton, and one John Roach went to Annie Hitchcock's about dusk that evening, Brown carrying a Winchester and Roach a double-barreled shotgun (Caywood, p. 9), remained about three-quarters of an hour, and took several drinks of whiskey. Hampton had

a pistol (Roach, p. 12). The trio on leaving Hitchcock's, started for Cob Hill to meet Craig, passing Shirley's residence on the way.

Not meeting Craig, they started on their return, Brown and Roach on one horse. Brown riding behind. As they neared the Shirley place Hampton discharged his pistol, dismounted opposite the house, went to the gate and called out Whitehead (Roach, p. 12), who, with Poorboy, was in the room next to the gate; and in answer to the call Poorboy and Whitehead went outside (Mrs. Shirley, p. 8). When Hampton went up to the gate Roach and the defendant waited for him about fifteen or twenty steps away, and as Poorboy and Whitehead came out to the gate Hampton came down to where Brown was. Roach swears that his party knew that Whitehead was at Shirley's, and details, at pages 12 and 13 of the record, what happened on the appearance of Poorboy and Whitehead.

Poorboy announced himself as Heck Bruner (a deputy marshal), and Hampton immediately started off, when Poorboy caught his horse by the bridle. Whitehead then came up to Brown and Roach, claimed to be an officer, and asked Roach if he was Matthew or Jim Craig, to which Roach answered no. Whitehead, however, ordered Roach to get off his horse and consider himself a prisoner. As soon as he did so, Whitehead told Roach to lay down his shotgun, which he did; and while holding his horse with his left hand, and on a line between Whitehead and Brown, Roach was shot in the arm and shoulder by a shot from the direction of the latter. This Roach swears was the first shot fired. Roach's horse jumped and jerked him

down. He got up and started off, the firing meanwhile becoming rapid. When a short distance away, he looked back, and saw Brown shoot Whitehead while Whitehead was already lying on the ground.

Meanwhile, when Poorboy seized the bridle of Waco Hampton's horse he ordered Hampton to surrender, stating that he was a marshal and had a right to arrest him. Instead of surrendering, Hampton jumped off his horse on the opposite side and fired at Poorboy. Roach testifies that the firing by Hampton began immediately after the shot from the direction of Brown.

Whitehead was not doing anything at the time the first shot was fired, and made no use of his pistol.

After the killing, Hampton took Poorboy's gun from under him, and when he and Brown got up to Roach Brown had Whitehead's pistol. Brown returned to where the bodies were and got Roach's shotgun.

Mrs. Shirley testifies that while the shooting was in progress (p. 8), shortly after Poorboy and Whitehead left the room, she heard guns fire and a voice, which she believed to be Whitehead's, say: "Hold on, John Brown; I am your friend," and the reply came, "By God, we are fighters from the West." She further testifies that the guns and pistols of Whitehead and Poorboy, the belt of Poorboy, and the money of Whitehead were missing when the bodies were examined next morning. On the morning after the killing, Brown admitted, in the presence of Craig, to Frank Hamilton that he killed Whitehead (p. 11), and also made the same admission to others (Caywood, p. 10; Hale, p. 14).

Mr. and Mrs. Manus, Hampton's stepfather and mother, testified (p. 15) that defendant and Hampton called at their house a couple of hours after the killing and showed the gun and pistols taken from the dead men; and that Brown exhibited three dollars in silver, which he stated that he had taken from Whitehead, stating further that he had shot Whitehead in the forehead.

Beside Mrs. Shirley and Roach, the only other living person who saw or heard any of the occurrences connected with the killing, was the defendant Brown, whose testimony appears at pages 18 and 19 of the record.

Brown testifies that the first shooting was between Hampton and Poorboy; that Hampton, on being ordered to get down from his horse, jumped on the opposite of his horse from Poorboy and commenced firing; that on being asked by Whitehead if he were Matthew or Jim Craig, Roach said no, and on being ordered to do so, dismounted, as did Brown; that he (Brown) was told to lay down his gun, but did not do it; didn't notice whether Roach threw down his gun; that about the time Hampton commenced firing he felt something strike his pants, and thought he was shot; heard Roach holler, and "about that time Hampton had killed his man and was shooting at this other man, and I drew up my gun and fired only one shot, or tried to fire. Am not sure whether I fired or not."

Brown denies taking any money or property from either one of the deceased, or exhibiting any money to Mr. and Mrs. Manus.

Poorboy was shot three times in the arm, twice in the body, once in the side of the face, and once in the nose. (Thompson, Rec., p. 9.)

Whitehead was shot in the neck, centre of forehead, and in the body, apparently while lying on his back. (Thompson, p. 9; and see Roach, p. 13; Manus, p. 15.)

After the killing, Brown, Hampton, and Roach left the bodies where they fell and went to Annie Hitchcock's (Roach, p. 14; Caywood, p. 9); from there Brown and Hampton appear to have gone to Hampton's home (Sam Manus, p. 5), but wound up at Hamilton's, where they slept in the stable loft, and Jim Craig was with them at Hamilton's house next morning. (Hamilton, p. 10.)

Hampton was killed a few days after the homicide while resisting arrest, and Brown was arrested the day following Hampton's death, while in bed and making an effort to get his gun to shoot the officers. (Bruner, pp. 11, 12.)

On October 20, 1894, the jury returned separate verdicts (p. 5), finding the defendant guilty of murder as charged in each of the counts of the indictment; and, motion for new trial being overruled, sentence of death was passed on the defendant upon the count for the killing of Whitehead (p. 6).

The assignment of errors appears at pages 46 to 50 of the record.

ARGUMENT.

No error has been assigned to the action of the court in suspending sentence upon the verdict on the first count of the indictment. The order, however, in the particular mentioned did not prejudice the substantial rights of the accused, and would constitute no reason in itself for the reversal of the judgment. (*Pointer* v. *United States*, 151 U. S., 396, 419.)

I, II, III.

Records of indictment and conviction of Jim Craig for adultery, and conviction of Wacoo Hampton for manslaughter.

The indictment of Jim Craig was clearly relevant, as explaining the presence of Poorboy and Whitehead and their actions just before the killing. They had plainly a right to take a good look at the riding party, under the suspicious circumstances of the case, to make sure that Craig was not one of them. It is not expressly stated that they had a warrant for Craig, but that is a possible inference from the testimony of John Shirley (p. 8) and Lamb (p. 11).

Wacoo's conviction was relevant, as showing that he was eluding the officers, and as bearing on the intent of defendant, his constant companion, the probable reason for defendant's being armed, and the probability of defendant's being surprised at the affray; especially in view of the testimony that Heck Bruner was looking for Wacoo with a warrant (pp. 11, 12), and that defendant thought it was Heck Bruner they had killed (pp. 9, 10, 15).

Moreover, both of these facts had already been testified to orally without objection, so that the records can have done no harm (pp. 8, 10, 11, 12).

The record of Craig's subsequent conviction was harmless. The actual firing, by defendant's own admission, had nothing to do with the Craig episode (XI, *infra*), although it was a search for Craig that brought the parties together.

IV.

The fourth assignment of error seems to refer to an exception noted on page 17 of the record. This relates simply to the exclusion of an "offer to prove" by the witness "a conversation between himself and Wacoo Hampton some time before the killing." The purport even of the conversation is not given.

V and VI.

The fifth and sixth assignments of error were to a question propounded on cross-examination of Hugh Hamilton, a witness for the defendant, and to the answer. Hamilton, on direct examination, had testified that he knew the reputation of defendant as a peaceable and law-abiding man to be good, and he was asked on cross-examination, by the district attorney, if he knew or had heard of the defendant having introduced whisky up there (Cherokee Nation) at any time, to which he answered that he had heard that defendant was a whisky peddler.

The introduction of ardent spirits into the Indian country being a penal offense (Rev. Stat., § 2139), the cross-examination tended to show that the reputation of defendant as a "law-abiding" citizen could not have been good, as claimed by the witness. By putting in this evidence of good character defendant opened the door for all proper cross-examination, and can not complain if this brought out the fact that he was guilty of another crime. (*Moore* v. *United States*, 150 U. S., 57, 61.)

VII.

The seventh assignment of error reads:

> It was error to allow the district attorney to introduce and examine Watt Hampton as a witness against defendant, because no notice had ever been served upon defendant that he would be called as a witness against him.

The objection appears on page 19, and was to an "offer to introduce" Watt Hampton as a witness, by way of rebuttal. It nowhere appears, however, that the offer was followed by the examination of Hampton. It is therefore unnecessary to discuss the contradictory state of the record. Hampton's name was endorsed on the indictment as a witness for the Government (p. 3), and the record of the proceedings of October 17, 1894, recites that defendant had been served with "a full and complete list of the witnesses in this cause" (p. 4).

VIII.

The eighth assignment of error relates to a portion of the charge which appears on page 30 of the record. It is, in substance, an instruction that if the proof showed that the killing (which was not disputed to have been with a deadly weapon) was wilful, and was not committed in self-defense or was not attended with mitigating circumstances, it was a killing with malice aforethought.

It being sufficient that the killing was with malice, express or implied, and the law implying malice from the intentional use of a deadly weapon, without just cause or excuse, the instruction was not objectionable.

Upon the trial of an accessory, record evidence of the conviction of the principal is prima facie proof of the guilt of the principal. (*Whar. Crim. Ev.*, § 602.)

The conviction supported the prima facie proof of guilt raised by the indictment.

Whether or not the deputies had recognized Hampton does not appear; but Brown had every reason to suppose that they had done so, and therefore that they had the right to arrest him.

XI.

This assignment of error includes, among many other things, a remark that "any citizen" had the right to arrest Jim Craig.

This remark was based upon the theory that adultery, the crime with which he was charged, was a "statutory felony." The learned judge's opinion on the motion for a new trial explains this, relying on Hawley on Arrest, on *Holley* v. *Mix* (3 Wend., 350), and other cases therein cited. This opinion is part of the transcript of record, although not printed.

The learned judge's theory, it may be conceded, is overthrown by the definition of felony now settled since *Bannon* v. *United States*, decided March 4, 1895. Adultery was once a crime at common law, but not for a long period prior to the Revolution, and therefore no arrest could be made without a warrant.

The remark, however, had no relevance to the case, and could do no harm to defendant. He does not claim to have been resisting an unlawful arrest, but to have engaged in a general affray commenced by his own companion,

Hampton, who, as he knew, was liable to arrest. The Jim Craig affair cut no actual figure in the fight.

Defendant does not claim to have been influenced in any way by fear of his own arrest or that of Roach, which was avoidable by mere reference to the Shirleys, nor does he claim that Hampton was mistaken for Craig.

But fear of an unlawful arrest does not justify killing unless there is fear of great bodily harm, or at least of some force. (*Noles* v. *State*, 26 Ala., 31; *State* v. *Underwood*, 75 Mo., 230, 238.)

XII.

The court's comments on defendant's testimony are justified by *Reagan* v. *United States*, and *Johnson, alias Overton*, v. *United States*, decided March 25, 1895.

XIII.

This assignment is not based upon any definite exception. The instruction seems unexceptionable. (*Brown* v. *United States*, 150 U. S., 93, 95; *Brooks* v. *Commonwealth*, 61 Pa. St., 352, 357; *Galvin* v. *State*, 6 Cold., 283, 284, 290; see also *Rafferty* v. *People*, 69 Ill., 111; *State* v. *Ashley*, 45 La. An., 1036.)

XIV.

This also is not based upon a definite exception. Nothing further need be added here to the remarks under XI, *supra*.

Respectfully submitted.

EDWARD B. WHITNEY,
Assistant Attorney-General.
WM. H. POPE.

O

Copy

AFFIDAVIT.

STATE OF WEST VIRGINIA,

COUNTY OF CABELL, TO-WIT:

John B. Laidley, being duly sworn, says that he is the defendant in a writ of error pending in the Supreme Court of the United States, in which the Central Land Company of West Virginia is plaintiff in error; that the action in which said writ of error was awarded is an action of ejectment to try the title to a tract of land situate in the City of Huntington, County of Cabell, State of West Virginia; that said tract is a strip bounded by two parallel, straight lines nearly 800 feet apart, extending from the Ohio river in a Southerly direction nearly one mile across the river bottom, and nearly parallel with the lines of the streets of said City; the avenues of said City run East and West across said land nearly parallel with the river.

Affiant says that 9th and 10th streets and 3rd and 4th avenues are at present the business center of said City, said streets extending from the steamboat landing to the C. & O. depot. That the upper line of said tract crosses 2nd avenue near the river bank at the West line of 7th street, 3rd avenue near the middle of 7th street, and 4th avenue near the East line of 7th street, just two blocks from the business center.

Affiant says that the Court House bleck has lately been located partly on the said land between 4th and 5th avenues with a view to the erection of a handsome Court House and Jail.

And that at a meeting of the City Council in the month of October, 1892, a motion was made in said Council, and which was favored by all the members of the Council as affiant is informed, looking to the purchase of a portion of said land lying on 4th avenue just West of the Court House square and 7th street for the purpose of erecting a Town Hall for City purposes at the City's expense, and also a public Market House at the City's expense; that action on said motion was postponed for the present.

majority of

And affiant says that since the decision of the Supreme Court of Appeals of West Virginia on the 26th day of

November, 1887, on a former writ of error in said action of ejectment, declaring void the deed of S. H. G. Pennybacker to C. P. Huntington, dated February 25, 1870, under which the Central Land Company claims title to said land, a large number of persons relying upon said decission have purchased parcels of said land from said Laidley and are anxious to build upon and improve the same. Such purchases are located on 2nd, 3rd, 4th, 5th, 6th, and 7th avenues in said City; that the pendency of this writ of error keeps the title so unsettled that such owners will not improve their property, and others are prevented from buying land lying in said strip, and thereby the growth and improvement of the City is seriously and materially retarded.

Affiant further says that the City of Huntington has now a population of about 15,000. That Central City has been founded adjoining said City of Huntington on the West, and only five squares West of the West line of said strip, and has now a population of something over 1000, and both cities are rapidly growing in population and wealth.

Affiant says that the Central Land Company of West Virginia, which owns nearly all the land in said City West of said strip, refuses to sell any lots whatever lying West of said strip between said Central City and said strip of land on account of this litigation, thereby also greatly hindering the growth of said City in a Westerly direction.

Believing that an early decision of the motion to dismiss the writ of error to be submitted on the 12th day of December, 1892, will have a tendency to dispel the cloud upon the title to said land and promote the interests of said City, the affiant asks in behalf of himself and the purchasers aforesaid, and in behalf of the City of Huntington, that the Honorable, the Supreme Court of the United States, will take decisive action upon said motion to dismiss the writ of error aforesaid.

John B Laidley

TAKEN, SWORN TO AND SUBSCRIBED before me in my said County, this 18th day of November, 1892.

Geo. M. McClennan,
Notary Public.

Chief Justice & Associate Justices

To the Honorable the Judges of the Supreme Court of the United States:

The undersigned petitioners have read the affidavit hereto annexed, of John B. Laidley, defendant in the writ of error pending in the Supreme Court of the United States, in which the Central Land Company of West Virginia is plaintiff in error, and we adopt the allegation of said affiant as our own, and join in the prayer contained therein.

W. H. Bull, Mayor,

J. K. Ouery
C. E. Swinn
J. F. Stewart
Jas. S. Sutphin
Jno A. Cassler
B. K. Stanley
E. A. Burnett

} Members of the city council of the city of Huntington

J. N. Potts, city clerk
C. W. Campbell, city atty
Scott Turner, city Marshall
L. W. Seely, city Engineer

Purchasers:

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L. D. Sebell
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J. J. Bryan
E. C. Horlacher
C. Cohen
J. K. Ousy, Cashier Bank of Huntington
J. L. Caldwell, Pres. Cen. L. & Ry Co.
J. T. Wilson Constable
J. H. Holt
J. S. Terry

The names of twenty five others purchasers can be added to the above list if deemed necessary

J. B. Yandle, Atty.

STATE OF WEST VIRGINIA,

COUNTY OF CABELL, TO-WIT:

John B. Laidley, being duly sworn, said that he gave a true copy of the foregoing affidavit and petition hereto annexed to H. C. Simms, attorney for the Central Land Company of West Virginia, at the city of Huntington, County of Cabell, State of West Virginia, on the Twenty-first day of November, 1892; and that the signatures to said petition are genuine.

John B Laidley

Taken, sworn to and subscribed before me in my said county this Twenty-first day of November, 1892.

Geo. M. McDermit,

Notary Public.

Office Supreme Court U. S.
FILED.
DEC 12 1892
JAMES H. McKENNEY,
CLERK.

STATE OF WEST VIRGINIA,
County of Kanawha, } ss:

B. W. Foster, being duly sworn, says that he is general superintendent and agent of The Central Land Company of West Virginia, the plaintiff in error in the Supreme Court of the United States in the case of John B. Laidley *vs.* Central Land Company of West Virginia, in ejectment; that on a petition of the stockholders of the Central Land Company and a bill filed for that purpose in the circuit court of the United States for the district of West Virginia C. P. Huntington was, in the year 1890, appointed receiver for the purpose of winding up and closing out the business and affairs of the Central Land Company aforesaid, and that he, affiant, since the appointment of the said receiver has been acting and is now acting as general agent and superintendent of the company for the said receiver and engaged in making sales of the real estate belonging to the said Central Land Company under the direction of the said receiver and the circuit court of the United States for the district of West Virginia.

That the city of Huntington occupies only a small portion of the land belonging to the Central Land Company; that there are a great many unsold lots still remaining, which are being offered for sale at reasonable prices and sold as rapidly as purchasers can be found; that there is no hindering of the development of the city from want of land on which to grow or build; that the strip of land in controversy in the said ejectment suit is only a very small portion of the entire body of land; that the streets and roads of the city are open through the same, and no one is prevented from using said streets by reason of the litigation concern-

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CLERK.

STATE OF WEST VIRGINIA,
County of Kanawha, } ss:

B. W. Foster, being duly sworn, says that he is general superintendent and agent of The Central Land Company of West Virginia, the plaintiff in error in the Supreme Court of the United States in the case of John B. Laidley *vs.* Central Land Company of West Virginia, in ejectment; that on a petition of the stockholders of the Central Land Company and a bill filed for that purpose in the circuit court of the United States for the district of West Virginia C. P. Huntington was, in the year 1890, appointed receiver for the purpose of winding up and closing out the business and affairs of the Central Land Company aforesaid, and that he, affiant, since the appointment of the said receiver has been acting and is now acting as general agent and superintendent of the company for the said receiver and engaged in making sales of the real estate belonging to the said Central Land Company under the direction of the said receiver and the circuit court of the United States for the district of West Virginia.

That the city of Huntington occupies only a small portion of the land belonging to the Central Land Company; that there are a great many unsold lots still remaining, which are being offered for sale at reasonable prices and sold as rapidly as purchasers can be found; that there is no hindering of the development of the city from want of land on which to grow or build; that the strip of land in controversy in the said ejectment suit is only a very small portion of the entire body of land; that the streets and roads of the city are open through the same, and no one is prevented from using said streets by reason of the litigation concern-